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Money is for Nothing: The Inherent Want of Consideration Found in Substantial Exclusivity Terms Within Tribal-State Compacts

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Money is for Nothing: The Inherent Want of Consideration Found in Substantial Exclusivity Terms Within Tribal-State Compacts

Cover Page Footnote

J.D. Candidate, University of Idaho College of Law, Class of 2017; M.A. in History, Southern Illinois University Carbondale, May 2013; Member of the Ramapough Lenape Nation. The author would like to thank Dean Angelique EagleWoman for her lessons and guidance during her time at the University of Idaho College of Law and while this article was in its infancy. The author would also like to thank Professor Gray H. Whaley for his lessons, guidance, and patience, while the author finished his Masters study. The Author also would like to thank all those who either read earlier versions of this article and provided feedback or helped in other ways to make this article happen, including, but not limited to: Professor Peter C. Alexander (a.k.a. Uncle Peter), Professor Robert Williams, Jr., Travis Hartshorn, James Johnson, Annie Chaivre, and everyone else who contributed during this process in one way or another. Finally, the author would like to thank the AILJ editorial staff for their contributions and suggestions during the editing process

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*Paul C. Alexander II**

I. INTRODUCTION

One of the most enduring misunderstandings within the American public is that Indian gaming makes Native American tribes instantly wealthy. Although the unemployment rate within tribal communities is about 15%,¹ this statistic is not wholly representative. Unemployment rates in some tribal communities exceed 80%.² The myth of the wealthy Indian endures because wealthier gaming tribes represent the exception rather than the norm. Economically successful tribes, such as the Mashantucket Pequot Tribe, the Mohegan Tribe, the Pechanga Band of Luiseño Indians, and the Shakopee Mdewakanton Sioux Community, are the faces of the myth and are unfortunately not the norm.³ The reality,

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¹ *Dispelling the Myths About Indian Gaming*, NATIVE AMERICAN RIGHTS FUND (Jan. 14, 2015), <http://www.narf.org/indian-gaming/> (last visited Feb. 9, 2016).

² Vincent Schilling, *Getting Jobbed: 15 Tribes With Unemployment Rates Over 80 Percent*, INDIAN COUNTRY TODAY MEDIA NETWORK (Aug. 29, 2013), <http://indiancountrytodaymedianetwork.com/2013/08/29/danger-zone-15-tribes-unemployment-rates-over-80-percent-151078> (last visited Oct. 14, 2016).

³ See NATIVE AMERICAN RIGHTS FUND, *supra* note 1. See also Mark Fogarty, *California Indian Gaming Reaches \$7 Billion Again*, INDIAN COUNTRY TODAY MEDIA NETWORK (Oct. 31, 2015), <http://indiancountrytodaymedianetwork.com/2015/10/31/california-indian-gaming-reaches-7-billion-again-162240> (last visited Oct. 14, 2016). The Mashantucket Pequot are located in Connecticut and own the Foxwoods Resort Casino. The Mohegan Tribe is also located in Connecticut and own the Mohegan Sun. The Pechanga Band of Luiseño Indians are located in California

as of 2014, is that while the 459 Indian gaming facilities within the United States generated over \$28 billion dollars in gross revenues, 26 out of 566 federally recognized tribes produced 40.3% of the revenue.⁴ The remaining 540 tribes shared the remaining 59.7% of revenue.

A second myth lies in the fundamental discrepancy of the economic realities for gaming tribes; all gaming tribes enjoy all the fruits of the gaming enterprises. This is false because of how the Indian Gaming Regulatory Act of 1988 (IGRA) has been implemented in practice and construed by the United States Supreme Court.⁵ Under the IGRA, the state is able to receive a percentage of net gaming revenue because any tribe that seeks to pursue Las Vegas or Atlantic City style gaming must enter into a tribal-state compact with a state.⁶ This allows the state bordering the reservation to secure for itself a substantial portion of net gaming revenue before the tribe realizes its profit since the IGRA allows the compact to include anything “directly related” to gaming.⁷ Although the IGRA initially required the states to negotiate compacts with tribes in “good faith,”⁸ the United States Supreme Court has declared the means of enforcing the “good faith” requirement unconstitutional.⁹ Many states now use compacting to require that tribes provide the state with a percentage of tribal gaming revenue under the guise of revenue sharing agreements.

In the typical revenue sharing agreement, the state will promise the tribe that it will not allow any form of gaming competition within a defined area. This is commonly known as a “substantial

and own the Pechanga Resort and Casino. Finally, the Shakopee Mdewakanton Sioux Community are located in Minnesota and own the Mystic Lake Casino.

⁴ Indian Entities Recognized and Eligible To Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 5019 (Jan. 29, 2016); *2014 Tribal Gaming Revenues by Gaming Operation Revenue Range*, NATIONAL INDIAN GAMING COMMISSION (Jul. 8, 2015), www.nigc.gov/images/uploads/reports/2014GGRbyGamingOperationRevenueRange.pdf (last visited Feb. 9, 2016).

⁵ 25 U.S.C. § 2701–2721 (2012).

⁶ See 25 U.S.C. § 2710(d)(1)(C) (2012).

⁷ *Id.* § 2710(d) (2012).

⁸ *Id.* § 2710(d)(3)(A) (2012).

⁹ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996) (overruling *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989)); see also 25 U.S.C. § 2710(d)(7)(A)(i) (providing a cause of action for Tribes in United States District Court should a state refuse to negotiate a compact in good faith).

exclusivity” agreement. The Department of the Interior consistently interprets substantial exclusivity as one of the quite few “meaningful concessions” a state can provide as consideration.¹⁰ In 2004, Deputy Assistant Secretary of the Interior, George Skibine, defined “substantial exclusivity” as something that provides a quantifiable economic benefit the state is not required to provide.¹¹ Such benefits include, “exclusive rights to game on a geographical basis [or] to tribes against non-Indian gaming. It also [can allow] the tribe to game in a geographical area to the exclusion of other Indian tribes.”¹² While substantial exclusivity is determined on a first-come-first-serve basis, it tends to require a prohibition against non-Indian competition or fee relinquishment if the state allows non-Indian competition.¹³ Consideration, however, is absent from substantial exclusivity agreements in a tribal economic framework. The state does not make a meaningful concession that accords with kinship relations, good faith transactions, generosity, stewardship

¹⁰ Letter from Bruce Babbitt, Secretary of the Interior, to Gary E. Johnson, Governor of New Mexico, (Aug. 23, 1997); *See* Letter from Kevin Washburn, Assistant Secretary of Indian Affairs, to Gary Besaw, Chairman, Menominee Indian Tribe of Wisconsin (Mar. 12, 2015) (denying Tribal-State compact between Menominee and Wisconsin); Letter from Kevin Washburn, Assistant Secretary of Indian Affairs, to Deval Patrick, Governor of Connecticut (Oct. 12, 2012) (denying Tribal-State compact between the Mashpee Wampanoag Tribe and Connecticut); *see also* Kevin Gover & Tom Gede, *The States As Trespassers in a Federal-Tribal Relationship: A Historical Critique of Tribal-State Compacting Under IGRA*, 42 ARIZ. ST. L.J. 185, 211 (2010). On occasion, the Department of the Interior will consider a package deal including substantial exclusivity and other benefits to satisfy the meaningful concession requirement. Such circumstances typically depend on the percentage of net revenue the revenue sharing agreement calls for. *See infra* Part V.C.

¹¹ *Indian Gaming Regulatory Act Amendments: Hearing on S. 1529 Before the Comm. on Indian Affairs*, 108th Cong. 108-475, 33-36 (2004); *see also* Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. ON LEGIS. 39, 75 n. 243 (2007) (providing older interpretations of the meaning of “substantial exclusivity”).

¹² *Indian Gaming Regulatory Act Amendments: Hearing on S. 1529 Before the Comm. on Indian Affairs*, 108th Cong. 108-475, 33-36 (2004) (statement of George Skibine, acting Deputy Assistant Secretary, Policy and Economic Development, Dep’t of the Interior).

¹³ Press Release, Bruce Babbitt, Secretary of the Interior, Statement on the New Mexico Gaming Compacts (Aug. 23, 1997), <https://web.archive.org/web/20071031090013/http://www.doi.gov/news/archives/indnmcom.html>.

and protection of resources, and interdependence with all living creatures.¹⁴

At a basic level, the IGRA clashes with tribal economics because it stipulates how tribes can use gaming revenue. This denies inherent tribal sovereignty because a tribe cannot fully define how it can use gaming revenue for tribal betterment.¹⁵ An ostensible argument exists that Congress acted pursuant to its trust responsibility through this infringement on tribal sovereignty. However, that argument is weak. In reality, the tribal-state compact breaches trust because revenue sharing agreements allow the state to secure a percentage of net gaming revenue before the tribe can allocate revenue for tribal betterment or distribute per capita payments to tribal members.¹⁶ Trust is further violated because tribes are unable to define surplus revenue and cannot provide for the tribal community before gifting revenue to the state. To put it bluntly, the IGRA's mechanism that allows the state to take a cut of gaming revenue before the tribe actually realizes gaming revenue is a failure by the United States to ensure that tribal needs are met.

Revenue sharing for substantial exclusivity agreements represents a failure by the United States because states are not negotiating in good faith. Compacts are typically devoid of the proper consideration necessary within a tribal economy. Want of consideration exists because the tribe must promise to provide the state a percentage of net revenue to begin compact negotiations. For tribal economics, the tribe loses the ability to define surplus revenue to contribute as a gift and forces the tribe to provide to the state before its own members. Tribal members are provided for last.

¹⁴ See Angelique A. EagleWoman, *Tribal Nation Economics: Rebuilding Commercial Prosperity in Spite of U.S. Trade Restraints – Recommendations for Economic Revitalization in Indian Country*, 44 TULSA L. REV. 383, 384–5 (2008) [hereinafter EagleWoman, *Tribal Nation Economics*]; see also Angelique EagleWoman, *Tribal Nations and Tribal Economics: The Historical and Contemporary Impacts of Intergenerational Material Poverty and Cultural Wealth Within the United States*, 49 WASHBURN L.J. 805, 836 (2010) [hereinafter EagleWoman, *Tribal Nations and Tribal Economics*].

¹⁵ 25 U.S.C. § 2710(b)(2)(B) (2012); see also EagleWoman, *Tribal Nation Economics*, *supra* note 14, at 408–9. Under the IGRA, tribes are limited to using net gaming revenue to fund tribal government or programs, the general welfare for the tribe, reinvestment for further economic development, donations, or to fund local government agencies.

¹⁶ See, e.g., *infra* Part V.C.

To show that substantial exclusivity arrangements do not provide consideration in a tribal economy, this article will first discuss what tribes expected from the IGRA. This will explain tribal economics and survey the political battle antecedent to the IGRA passage in 1988 where states attempted to regulate and tax tribal economic enterprises. Also to be discussed is the IGRA statutory requirements and what the tribal expectations were from the IGRA. Second, this article discusses initial challenges by both states and tribes after the IGRA's passage and the seminal case *Seminole Tribe of Florida v. Florida* where the Supreme Court declared the IGRA's enforcement mechanism for good faith negotiations unconstitutional. Third, this article transitions to discuss the absence of tribal economics in revenue sharing agreements. This is done through explaining what the Secretary deems a meaningful concession, how the *Seminole* decision forces tribes to submit to state demands for revenue sharing to begin compact negotiations, and how courts refuse to amend bad faith compacts. Fourth, this article demonstrates how consideration is wanting in substantial exclusivity provisions because gaming provides inherent economic benefits. Consideration is also wanting because substantial exclusivity is illusory. To demonstrate that consideration is wanting in a tribal economic model, this article analyzes practices employed by New York, Oklahoma, California, and Idaho. Finally, this article proposes recommendations to provide adequate consideration for substantial exclusivity arrangements in a tribal economic model. Needless to say, all parties need to change their course of dealing with each other to achieve this goal.

II. TRIBAL EXPECTATION OF THE INDIAN GAMING REGULATORY ACT

A. *Fleshing Out Tribal Economics*

Despite holding the power to deny compacts that violate the trust relationship, the Secretary approves revenue sharing for substantial exclusivity agreements that violate the trust relationship. Trust is violated because the compacting requirement forces the tribes and state to engage in a form of "cooperative federalism" that rejects

tribal economics.¹⁷ The IGRA is unique in that it attempts to pursue cooperative federalism through an attempt to balance tribal and state interests.¹⁸ Congress attempted to ensure this occurred through the requirement that states negotiate in good faith and the provision allowing a cause of action for tribes should a state fail to do so.¹⁹ In *Seminole Tribe*, however, the United States Supreme Court held that the enforcement mechanism to ensure good faith negotiations was unconstitutional.²⁰ This has allowed states to reject traditional forms of tribal economics that focus on the whole community and maintain an individualistic mentality that attempts to undermine tribal sovereignty at the bargaining table. This strains self-determination because tribes are constricted to the state's economic model for negotiations and are unable to engage in tribal economics at the bargaining table.²¹ Tribes are unable to maintain balance in their interactions and use of their resources as tribal economics demand because states often require tribes to agree to revenue sharing as a condition precedent to compacting.²²

A fundamental conflict exists between tribal economics and American capitalism. While profits and reinvestment drive capitalism, tribal economics depends on kinship relations, good faith dealings, and gift giving within the tribal community and neighboring communities.²³ Unlike capitalism, tribal economics considers the community and not the individual as the economic unit. Individuals gain independence through the ability to provide

¹⁷ Compare *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002) *aff'd sub nom* *Artichoke Joe's Cal. Grand Casino v. Norton*, 278 F. Supp. 2d 1174 (E.D. Cal. 2003) (stating that the "IGRA is an example of 'cooperative federalism' in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme."); with Alex Tallchief Skibine, *Indian Gaming and Cooperative Federalism*, 42 ARIZ. ST. L.J. 253 (2010) (discussing how cooperative federalism under the IGRA should be a cooperative tri-federalism – that includes the United States, state governments, and tribes each as sovereigns – that transitions from the trust relationship between the tribes and the United States).

¹⁸ Skibine, *Indian Gaming and Cooperative Federalism*, 42 ARIZ. ST. L.J. 253, 253 (2010).

¹⁹ 25 U.S.C. §§ 2710(d)(3)(A), (d)(7)(A) (2012).

²⁰ See *infra* Part III.

²¹ Gover & Gede, *supra* note 10, at 214; see also sources cited *infra* note 88.

²² EagleWoman, *Tribal Nations and Tribal Economics*, *supra* note 14, at 836.

²³ *Id.* at 806–07.

not only for themselves, but also for the whole community.²⁴ Status is then demonstrated by tribal members through gifts, feasts, and surplus trade within the tribe and the surrounding community.²⁵ Through this economic system, the tribe stewards all resources by first rationing out what is needed, and only then do surplus resources become commercial commodities for gifts or trade throughout the kinship network.²⁶ This ensures that the tribe minimizes excess taking of all resources and ensures fair dealings throughout the kinship network.²⁷ The tribe maintains a balance in commercial transactions by stewarding resources, providing for the community, and using the surplus to maintain kinship relations.²⁸ The interaction between the tribes and the United States, based on this system of exchange, has been stated as the linking of arms between brothers.²⁹

B. The Political Battle Between Tribes and States Before the IGRA

The IGRA was Congress's answer to tension between Indian gaming and Public Law 280. In 1953, Congress passed Public Law 280 to delegate criminal and civil jurisdiction over tribes to California, Minnesota, Nebraska, Oregon, and Wisconsin.³⁰ Public Law 280 also allowed all other states to voluntarily assume both civil and criminal jurisdiction over tribes within their jurisdiction.³¹ The grant of civil jurisdiction was only "over private civil litigation

²⁴ *Id.* at 807–08.

²⁵ *Id.* at 806–08.

²⁶ *Id.* at 806–08, 836–37.

²⁷ *Id.*

²⁸ *Id.* at 836.

²⁹ See generally ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800* (1997) (discussing how during the 17th and 18th centuries western individuals had to cooperate with tribes as equals for survival and how constructions of laws and treaties during that time should reflect that).

³⁰ Public Law 280, ch. 505, 67 Stat. 588, 588–89 (1953) (codified as amended at 18 U.S.C. § 1162 (2006 & Supp. IV 2010), and 28 U.S.C. § 1360 & note (2006)). Upon receiving statehood, Alaska was added as the sixth mandatory Public Law 280 state. See 18 U.S.C. § 1162(a) (2012).

³¹ Public Law 280, ch. 505, at § 7, 590.

involving reservation Indians.”³² This does not include jurisdiction over “general civil regulatory powers, including taxation.”³³

In the late 1970s and early 1980s, tribes began turning to bingo for economic development. Almost immediately, states sought to curtail tribal bingo and subject it to state regulation. The Fifth Circuit in *Seminole Tribe of Florida v. Butterworth* first addressed whether a state that voluntarily assumed jurisdiction through Public Law 280 could regulate tribal bingo.³⁴ There, Florida voluntarily assumed both civil and criminal jurisdiction over tribes to the fullest extent of the law, and it regulated bingo by non-tribal organizations.³⁵ However, the Seminole Tribe sought to engage in a profit-sharing agreement with a third party who would build and manage a bingo hall for the tribe.³⁶ Broward County, Florida sought to prevent the profit sharing agreement through Florida’s statutory regulations.³⁷ The court determined that Broward County exceeded Public Law 280’s grant of civil jurisdiction because Florida allowed bingo.³⁸

The second major case regarding tribal gaming before the IGRA was *California v. Cabazon Band of Mission Indians*.³⁹ In *Cabazon*, California, a mandatory Public Law 280 state, sought to impose state law to the Cabazon Band’s gaming operation. The State also tried to force the Tribe to keep profits in “special accounts” and use profits only for charitable purposes.⁴⁰ Riverside County, California also sought to subject the Tribe to ordinances prohibiting poker and other card games.⁴¹ To put it differently, California sought to stymie the Cabazon Band’s economic development by limiting the Tribe’s use of gaming profits and preventing tribal members from benefiting. California argued that although it allowed bingo and other forms of gambling, there was a public need to regulate high-stakes bingo to

³² *Bryan v. Itasca Cty., Minn.*, 426 U.S. 373, 385 (1976).

³³ *Id.* at 390. This determination as to the bounds of Public Law 280’s grant of civil jurisdiction has been defined as the “civil-regulatory” test.

³⁴ *Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310, 312–315 (5th Cir. 1981), *cert. denied* 455 U.S. 1020 (1982).

³⁵ *Id.* at 311, 313.

³⁶ *Id.* at 311.

³⁷ *Id.*

³⁸ *Id.* at 314–15.

³⁹ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

⁴⁰ *Id.* at 205.

⁴¹ *Id.* at 206.

prevent organized crime.⁴² The United States Supreme Court rejected California's argument because California allowed gaming within its borders and its attempt to police the Cabazon Band's gaming was regulatory under Public Law 280.⁴³

The *Cabazon* Court also answered whether a state could prevent tribes from making high-stakes bingo available to non-Indians who live off the reservation.⁴⁴ The Court balanced the federal interest of allowing tribes to pursue "tribal self-sufficiency and economic development" with the state interest in establishing law and regulations for its residents.⁴⁵ The Court understood the significance of gaming to the Cabazon Band's economy because the Tribe lacked natural resources.⁴⁶ Through the balancing test, the Court determined that while California may have had "a legitimate concern" about organized crime, federal policy trumped the State's interest because the gaming enterprise was critical for the Tribe to realize economic self-determination.⁴⁷

While the battles over regulating tribal gaming occurred, states and tribes also battled over whether a state can tax tribal enterprises on trust land to gain a cut of tribal revenue. Shortly after *Cabazon*, the Supreme Court in *Crow Tribe of Indians v. Montana* affirmed the Ninth Circuit's rejection of a state tax on tribal coal mining on both reservation and "ceded land" because Montana did not have a legitimate interest.⁴⁸ There, Montana sought to tax coal extracted from a "ceded area" of land that Congress required the Crow to handover to the United States in 1904.⁴⁹ Although non-Indians gained ninety eight percent of the area, the Tribe started a coal mining enterprise after regaining ownership of the remaining two percent through the Indian Restoration Act of 1958.⁵⁰ Montana then imposed a severance tax that varied from three to thirty percent and

⁴² *Id.* at 211.

⁴³ *Id.*

⁴⁴ *Id.* at 216.

⁴⁵ *Id.* The State's position was based on its ability to receive taxes from tribes stemming from transactions made by non-members on reservation lands.

⁴⁶ *Id.* at 218–221.

⁴⁷ *Id.*

⁴⁸ *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 903 (9th Cir. 1987), *aff'd* 484 U.S. 997 (1988).

⁴⁹ *Id.* at 896.

⁵⁰ *Id.* at 896–97.

a gross proceeds tax on each person who mined coal.⁵¹ Through the *Cabazon* balancing test, the Court found that coal production was vital to the Crow's economic development because coal leases "generate funds for essential Tribal service and provide employment for Tribal members."⁵² The Court held that Montana's taxation attempt to receive a portion of Crow's revenue was not narrowly tailored enough to override the federal policy of tribal self-determination.⁵³

Butterworth, *Cabazon*, and *Crow Tribe* set the stage for the IGRA. States had made it clear that they wanted to regulate tribal gaming, define what a tribe can do with gaming revenue, and take a share of tribal gaming revenue. Yet the courts acted as the tribes' brother and prevented states from acting in bad faith to pirate from and control tribal economies. In 1988, Congress addressed the conflict between the states' desire to regulate tribal gaming and the federal policy of tribal self-determination through the IGRA.⁵⁴ Unfortunately for tribes, the IGRA provided the states the mechanism necessary to regulate economic development and gain a share of tribal revenue. Congress did not provide a method for the tribes to assist states through surplus capital; it appeased its demanding children at the expense of its tribal brethren.

C. The Indian Gaming Regulatory Act of 1988

Congress made it obvious that the IGRA was a response to *Cabazon*. At first glance, the IGRA seeks to provide statutory guidance for gaming to promote "tribal economic development, self-sufficiency, and strong tribal governments" through gaming.⁵⁵ However, the direct response to *Cabazon* is that the IGRA seeks:

to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary

⁵¹ *Id.*

⁵² *Id.* at 901 (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 220 (1987)).

⁵³ *Id.* at 902.

⁵⁴ 25 U.S.C. § 2701(3)-(4) (2012).

⁵⁵ *Id.* § 2702(1).

of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players.⁵⁶

The IGRA's compact requirement extended Public Law 280's reach into Class II and Class III gaming for non-Public Law 280 States since all states must either allow tribes to conduct gaming within its borders or completely prohibit its citizens from gaming.⁵⁷ Congress created the National Indian Gaming Commission (NIGC) to regulate Indian gaming, ensure congressional policy is met, and "to protect such gaming as a means of generating tribal revenue."⁵⁸ The Chairman of the NIGC is tasked with approving relevant tribal ordinances or resolutions for Class II or Class III gaming.⁵⁹

The IGRA charges the Secretary of Interior with approving tribal-state compacts required for Class III gaming.⁶⁰ Although the "good faith" negotiation requirement's enforcement process has been abrogated by the Supreme Court,⁶¹ the Secretary fulfills his duties through the review of compacts to ensure that the State does not impose "any tax, fee, charge, or other assessment" onto the tribe.⁶² Only if a compact violates the IGRA, federal law, or "the trust obligations of the United States to Indians" can the Secretary disapprove a compact.⁶³

The IGRA divides Indian gaming into three separate classes with statutorily defined characteristics, restrictions, and requirements. First, Class I gaming consists of "social games solely for prizes of minimal value or traditional forms of Indian gaming . . . as a part of, or in connection with, tribal ceremonies or

⁵⁶ *Id.* § 2702(2).

⁵⁷ See generally Jacob Berman, *Such Gaming Causes Trouble: Constitutional and Statutory Confusion with the Indian Gaming Regulatory Act*, 23 SETON HALL J. SPORTS & ENT. L. 281, 283 (2013); Kathryn R.L. Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence over Indian Gaming*, 90 MARQ. L. REV. 971, 976-77 (2007).

⁵⁸ 25 U.S.C. § 2702(3); see also 25 U.S.C. § 2704.

⁵⁹ *Id.* § 2705(3)-(4).

⁶⁰ *Id.* § 2710(d)(8)(i)-(iii).

⁶¹ Compare 25 U.S.C. § 2710(d)(3)(A) (2012); with *infra* Part III (discussing how the United States Supreme Court determined § 2710(d)(3)(A) unconstitutional and the ramifications of that holding).

⁶² 25 U.S.C. § 2710(d)(3)-(4) (2012).

⁶³ *Id.* § 2710(d)(8)(B).

celebrations.”⁶⁴ Congress expressly excluded Class I gaming from the IGRA’s statutory reach and placed it “within the exclusive jurisdiction of the Indian tribes.”⁶⁵

Second, games classified as Class II include “game[s] of chance” like bingo for monetary or other prizes “in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards.”⁶⁶ If a State allows or does not expressly prohibit card games, those games are also considered Class II games.⁶⁷ To conduct Class II gaming for economic development, the tribe must be located in a state “that permits such gaming for any purpose by any person, organization or entity.”⁶⁸ The NIGC Chairman must also approve a tribal “ordinance or resolution” that allows the gaming on Indian lands.⁶⁹

Finally, the IGRA defines Class III gaming as “all forms of gaming that are not class I gaming or class II gaming.”⁷⁰ The most common forms of Class III games are those typically seen in Las Vegas or Atlantic City such as slots, poker, craps, blackjack, and roulette. To conduct Class III gaming for economic development, the tribe must meet the requirements to pursue Class II gaming.⁷¹ The tribe must also request the bordering state to enter into tribal-state compact negotiations.⁷² If that state allows the tribe to pursue Class III gaming by agreeing on a compact, the tribe must conduct the gaming enterprise “in conformance with [the] tribal-state compact.”⁷³

⁶⁴ *Id.* § 2703(6) (2012). Examples of Class I games include archery, dice and shell games, and races. STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE 39 (2005).

⁶⁵ 25 U.S.C. § 2710(a)(1) (2012).

⁶⁶ *Id.* § 2703(7)(A)(i)(I)–(III).

⁶⁷ *Id.* § 2703(7)(A)(ii)(I)–(II).

⁶⁸ *Id.* § 2710(b)(1)(A).

⁶⁹ *Id.* § 2710(b)(1)(B).

⁷⁰ *Id.* § 2703(8). Colloquially, Class III gaming is known as Las Vegas or Atlantic City style gaming and includes slot machines and banking card games typically seen in modern casinos. *See id.* § 2703(7)(ii)(B).

⁷¹ *Id.* § 2710 (d)(1)(A)–(C).

⁷² *Id.* § 2710 (d)(3)(A).

⁷³ *Id.* § 2710(d)(1)(B)–(C).

The IGRA originally required the state to “negotiate with the Indian tribe in good faith to enter into such a compact.”⁷⁴ Compacts can contain agreements for: 1) civil and criminal jurisdiction for licensing and regulation; 2) criminal and civil jurisdiction for enforcement of laws and regulations; 3) costs to the state for regulation; 4) taxation of the tribe; 5) remedies for breach of contract; 6) standards operation and maintenance; and, 7) anything else directly related to gaming operations.⁷⁵ Despite the vast scope of what a compact can entail, any assessment cannot “tax, fee, [or] charge” the tribe.⁷⁶ After compact negotiations finish, the Secretary can deny compacts if he determines the compact violates the IGRA, Federal law not related to Indian gaming jurisdiction, or the trust relationship between the Tribe and the United States.⁷⁷

The IGRA provided tribes a cause of action in any United States district court for a state’s failure to enter into compact negotiations or refusal to negotiate in good faith.⁷⁸ Before filing an action to compel negotiations, the tribe was required to provide the state with 180 days to enter negotiations.⁷⁹ After this period expired, the tribe then had to show the court that a compact had not been agreed upon and that the state did not respond to the request to negotiate or did not respond to the request in good faith.⁸⁰ The state bore the burden to prove good faith negotiations and if the court found the state failed to negotiate in good faith, the court then ordered that a compact be agreed upon within 60 days.⁸¹ Should the tribe and state fail to fulfill the court order, each party then provided a court-appointed mediator a proposed compact.⁸² The mediator chose the best compact and submitted it to the tribe and the state.⁸³ Upon receipt of the mediator’s decision, the state had 60 days to accept or

⁷⁴ *Id.* § 2710(d)(3)(A). The enforcement process, through federal courts, of the requirement that the State negotiate in good faith has been deemed unconstitutional. *See infra* Part III.

⁷⁵ *Id.* § 2710(d)(3)(C)(i)–(vii) (2012).

⁷⁶ *Id.* § 2710(d)(4).

⁷⁷ *Id.* § 2710(d)(8)(B)(i)–(iii).

⁷⁸ *Id.* § 2710(d)(7)(A)(i) (2012).

⁷⁹ *Id.* § 2710(d)(7)(B)(i).

⁸⁰ *Id.* § 2710(d)(7)(B)(ii)(I)–(II).

⁸¹ *Id.* § 2710(d)(7)(B)(ii)–(iii).

⁸² *Id.* § 2710(d)(7)(B)(iv).

⁸³ *Id.* § 2710(d)(7)(B)(iv)–(v).

deny the decision.⁸⁴ If the state agreed, then the compact would be submitted to the Secretary for further review.⁸⁵ If not, then the Secretary promulgated procedures, with the Tribe's assistance, that defined the Tribe's Class III gaming opportunities consistent with the mediator's chosen compact and the state's law.⁸⁶

D. What Indian Gaming Intended to Provide Tribes

Congress passed the IGRA in 1988 to "promote tribal economic development, tribal self-sufficiency, and strong tribal government."⁸⁷ Congress recognized the persistent economic depression that plagues many reservations and intended for the IGRA to be a remedy. To put it differently, the IGRA is representative of the trust relationship between tribal nations and the United States based on historical kinship ties.⁸⁸ The IGRA was an opportunity for tribes to achieve tribal self-sufficiency and to return to a state of prosperity enjoyed before European contact.⁸⁹

Although clearly an attempt to promote tribal self-determination, Congress limited tribal inherent sovereignty. Under the IGRA, tribes are only granted the "exclusive right to regulate gaming activity on Indian lands" if that land is in a state that "does not, as a matter of criminal law and public policy, prohibit such gaming activity."⁹⁰ It is arguable that the IGRA intended to elevate tribal sovereignty to that of the bordering state and thus acted in good faith. The further erosion of tribal inherent sovereignty shows

⁸⁴ *Id.* § 2710(d)(7)(B)(vi)–(vii).

⁸⁵ *Id.* § 2710(d)(7)(B)(vi).

⁸⁶ *Id.* § 2710(d)(7)(B)(vii).

⁸⁷ *Id.* § 2701(4) (2012).

⁸⁸ The Supreme Court considers the trust relationship as one of a guardian-ward relationship. The tribes are considered wards of the United States and the United States acts as the tribes' guardian, burdened with the "responsibility to protect or enhance tribal assets." DAVID WILKINS AND TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 65 (2001); *see also* Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[3][a] (2012) (discussing the historical development of the trust doctrine).

⁸⁹ *See* EagleWoman, *Tribal Nations and Tribal Economics*, *supra* note 14, at 838.

⁹⁰ 25 U.S.C. § 2701(5) (2012).

the falsity of that argument because tribes are extraconstitutional and are not bound by federal law.⁹¹

Tribes are extraconstitutional because they did not participate in the Constitutional Conventions and retain all sovereign rights not surrendered to the United States.⁹² Constitutional constraints do not apply to tribes, and their sovereignty is guaranteed by treaties that oblige the United States to protect Indian land from confiscation, “preserve tribal hunting, fishing, and usufructuary rights,” maintain tribal trust property, and provide specialized government services to tribes.⁹³ Although tribes are extraconstitutional, the forced bargaining partner, the states, are bound by the Constitution and can have their rights enforced in United States District Court. Tribes do not have this liberty and have no recourse in Court absent congressional action.⁹⁴ The IGRA did provide tribes a cause of action in the event states refused to negotiate in good faith. However, judicial action soon caused this enforcement mechanism to be deemed unconstitutional because it violated state sovereignty.⁹⁵ States have seized on this declaration to refuse to negotiate in good faith and force tribes to submit to revenue sharing agreements.

III. EARLY CHALLENGES TO THE IGRA AND THE END OF GOOD FAITH

Both tribes and states responded to the IGRA’s compact requirement with discord. Tribes found the compacting requirement an infringement on their sovereignty. States still wanted the ability to regulate and control tribal gaming and not be forced to negotiate in good faith. As demonstrated below, however, the Court in *Seminole Tribe of Florida v. Florida* declared the IGRA’s

⁹¹ See *Talton v. Mayes*, 163 U.S. 376, 384–85 (1896) (holding aspects of inherent tribal sovereignty not abrogated by Congress’s plenary authority over tribes are not subject to the United States Constitution).

⁹² Carol Tebben, *An American Trifederalism Based Upon the Constitutional Status of Tribal Nations*, 5 U. PA. J. CONST. L. 318, 324 (2003).

⁹³ Hope Babcock, *A Possible Solution to the Problem of Diminishing Tribal Sovereignty*, 90 N.D. L. REV. 13, 26-27 (2014); Matthew L.M. Fletcher, *Retiring the “Deadliest Enemies” Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 76 (2007).

⁹⁴ See *Cherokee Nation*, 30 U.S. 1, 20 (1831).

⁹⁵ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996).

enforcement process to ensure good faith negotiations unconstitutional.⁹⁶ The Secretary and some courts have tried to provide tribes remedies if a state refuses to negotiate in good faith.⁹⁷ Yet, the reactionary measures taken have not gone far enough as they allow states to take a substantial amount of gaming net revenues through revenue sharing agreements.

The Red Lake Band of Chippewa asserted to the court that the IGRA's compact requirement exceeded Congress's plenary power over tribes. To do so, the tribe argued that the IGRA violated: (1) their right to self-determination preserved in treaty rights, federal law, and inherent sovereignty; (2) the trust relationship; and, (3) their right to self-government in violation of the Fifth Amendment.⁹⁸ The United States District Court for the District of Columbia determined that the tribe suffered no injury because Congress has "virtually unlimited power over the Indian tribes" and "tribal sovereignty is but a stick in front of a tank."⁹⁹ The court also determined that Congress acted pursuant to the trust relationship and ruled against the Tribe's Fifth Amendment due process claim because Congress "could reasonably address the concern of infiltration of organized crime into Indian gaming."¹⁰⁰ The court upheld the compact requirement and appeased the states at the Tribe's expense. This further eroded the relationship between tribes and the states who are seen as the United States' children by tribes.

Many states also did not see the need to negotiate in good faith with tribes. In early challenges, courts did require states to negotiate in good faith as demanded by the IGRA. For example, Connecticut refused to enter compact negotiations with the Mashantucket Pequot Tribe despite the State allowing "Las Vegas nights" with games of chance.¹⁰¹ The Second Circuit found that the Tribe requested the

⁹⁶ *Id.* at 57.

⁹⁷ *See* 25 C.F.R. § 291 (1999).

⁹⁸ *Red Lake Band of Chippewa Indians v. Swimmer*, 740 F. Supp. 9, 10 (D.D.C. 1990). The Tribe also argued that the IGRA unconstitutionally restricted the powers of federal courts. *Id.*

⁹⁹ *Id.* at 11 (quoting *Native Village of Venetie I.R.A. Council v. Alaska*, 687 F. Supp. 1380, 1392 (D. Alaska 1988)).

¹⁰⁰ *Id.* at 16.

¹⁰¹ *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1027 (2d. Cir. 1990).

State to enter compact negotiations.¹⁰² This required Connecticut to negotiate with the Tribe for the same games allowed at “Las Vegas nights” because the State did not completely prohibit those games.¹⁰³ Negotiations did “not necessarily [subject the Tribe] to the entire State law on gaming.”¹⁰⁴

Despite being forced to abandon traditional kinship trade with the United States, tribes maintained faith that the courts would continue to force the states to negotiate in good faith. This did not happen and the predetermined trade partner, the states, continued to reject good faith negotiations. Despite the United States’ responsibility to preserve tribal economics as part of its trust responsibility, many courts determined that the IGRA’s good faith requirement violated state sovereign immunity under the Eleventh Amendment of the United States Constitution.¹⁰⁵ These courts viewed the compacting requirement not as a demand but as a “discretionary act.”¹⁰⁶ A circuit split arose that forced the United States Supreme Court to answer the question once and for all.¹⁰⁷ Unfortunately for tribes, the Court determined that although the IGRA required a tribal-state compact for Class III gaming, the state could not be forced to negotiate and eliminated the IGRA’s enforcement mechanism for good faith negotiations.¹⁰⁸

In *Seminole Tribe of Florida v. Florida*, the Court determined that the Seminole Tribe could not compel specific performance due to Florida’s refusal to enter good faith negotiations with the Tribe.¹⁰⁹ The Court acknowledged that “Congress clearly intended to

¹⁰² *Id.* at 1028–29.

¹⁰³ *Id.* at 1029.

¹⁰⁴ *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 366 n. 10 (8th Cir. 1990).

¹⁰⁵ *See Ponca Tribe of Okla. v. Oklahoma*, 37 F.3d 1422, 1436–37 (10th Cir. 1994) *cert. granted, judgment vacated sub nom*, *Oklahoma v. Ponca Tribe of Okla.*, 517 U.S. 1129 (1996); *Seminole Tribe of Fla. v. Florida*, 11 F.3d 1016, 1028 (11th Cir. 1994), *aff’d sub nom*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (both courts determined that the *Ex parte Young* doctrine is not applicable to the “good faith” requirement because the state was the interested party, not an arm of the state).

¹⁰⁶ *Ponca Tribe of Okla.*, 37 F.3d at 1437.

¹⁰⁷ *See Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d Cir. 1990) (holding that Connecticut had to enter compact negotiations after the Mashantucket Pequot Tribe requested that negotiations occur).

¹⁰⁸ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996).

¹⁰⁹ *Id.* at 76.

abrogate the States' sovereign immunity through [the good faith requirement in] § 2710(d)(7)."¹¹⁰ The Court also reaffirmed that the Indian Commerce Clause constituted of a "greater transfer of power" from the states to the United States than the Interstate Commerce Clause.¹¹¹ Despite these findings, the Court determined that the IGRA's requirement that states are subject to suit for failure to negotiate in good faith unconstitutional because it violated state sovereign immunity guaranteed by the Eleventh Amendment.¹¹²

The Court also rejected the *Ex Parte Young* exception for prospective injunctive relief against state officials to "end a continuing violation of federal law."¹¹³ The Court believed that because Congress, in § 2710(d)(7), provided tribes the remedy of a declaratory judgment that demands compact negotiations under § 2710(d)(3) to conclude within sixty days, the Seminole Tribe could not seek injunctive relief to compel negotiations.¹¹⁴ The Court determined that alternative remedies were not needed under § 2710(d)(7), because should the state fail to comply with the declaratory judgment, both the tribe and state would then submit proposed compacts to a mediator as the IGRA required.¹¹⁵

Although Congress attempted to fulfill its trust responsibility to protect and enhance tribal economics by providing tribes automatic relief should a State fail to negotiate, the Supreme Court rejected Congress's responsible appropriation of a duty on a state to negotiate in good faith. Yet, *Seminole's* holding left tribes in a precarious position because they could no longer challenge states that demanded a share of gaming revenue during compacting. Tribes are now dependent on the Secretary to issue regulations should the state refuse to negotiate. This new dependency exists since the

¹¹⁰ *Id.* at 57.

¹¹¹ *Id.* at 62. The Court made this distinction since States do enjoy authority over interstate commerce through the dormant Commerce Clause but can only exercise authority over Indian Commerce through express delegations by Congress. *See* *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (distinguishing between the Indian Commerce Clause and Interstate Commerce Clause); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 845–46 (1982) (rejecting existence of dormant Indian Commerce Clause).

¹¹² *Seminole Tribe of Fla. v. Florida*, 517 U.S. at 76.

¹¹³ *Id.* at 73–74 (internal quotations and citations omitted).

¹¹⁴ *Id.* at 74–76.

¹¹⁵ *Id.*

IGRA provides tribes no other remedy when a state refuses to negotiate in good faith and agency action has proven inadequate.¹¹⁶

IV. THE ABSENCE OF TRIBAL ECONOMICS IN REVENUE SHARING AGREEMENTS

Class III gaming is an offshoot of the United States policy of self-determination that aims to provide tribes the means to “direct[] their own development.”¹¹⁷ Tribes remain subjected to Congress’s power “[t]o regulate commerce . . . with the Indian tribes.”¹¹⁸ There is no question the IGRA limits tribes’ ability to achieve self-determination because many states use the compact requirement to “extort Indian tribes” for gaming net revenue.¹¹⁹ This hurdle rejects the foundation of the kinship relationship between states and tribes as permanent neighbors since it disincentivizes tribes to act with generosity by assisting the states with gaming revenue. Congress has essentially forced tribes to become subservient and dependent on the state for the ability to operate Class III gaming for economic development because of the compacting requirement.¹²⁰ This causes tension between the tribes and states because neither is looking out for the other’s best interest; rather, they seek only to profit of one another.

The *Seminole* decision effectively ended the IGRA’s enforcement of good faith negotiations to ensure tribes received adequate consideration in compacts.¹²¹ States are no longer required to enter into compact negotiations and many demand that tribes agree to revenue sharing as a prerequisite for negotiations. This practice does not provide tribes adequate consideration within a tribal economy because good faith is absent, it avoids generosity in favor of greed, infringes on the tribes’ sovereign right to determine

¹¹⁶ See *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1302 (9th Cir. 1998).

¹¹⁷ COHEN, *supra* note 88, at § 21.01; see also Letter from President Richard M. Nixon to the United States Congress (July 8, 1970), in *DOCUMENTS OF UNITED STATES INDIAN POLICY*, 256–58 (Francis Paul Prucha ed., 3d ed. 2000).

¹¹⁸ U.S. CONST. art. I, § 8, cl. 3.

¹¹⁹ Fletcher, *supra* note 11, at 58.

¹²⁰ Eric Lent, *Are States Beating the House?: The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 GEO. L.J. 451, 469–470 (2003).

¹²¹ See *supra* Part III.

surplus revenue, and violates the foundations of the kinship relationship between tribes and the United States as brothers.

Due to the United States' failure to require states to act in good faith, tribes are unable to steward and protect the monetary resources Class III gaming provides. Revenue sharing spurns tribal sovereignty because tribes bargain with states as unequal sovereigns, though both enjoy concurrent regulatory jurisdiction. The tribes' bargaining power is limited to its projected economic contributions that states crave, which makes tribes slightly more powerful than a mere beggar at negotiations.

The Fifth Circuit in *Texas v. United States* illustrated that tribes lack bargaining power.¹²² This came from a rejection of the Secretary's promulgation of 25 C.F.R. Part 291 in response to *Seminole*.¹²³ The rules contain provisions that apply when the state and tribe cannot agree on a compact, and the state asserts state sovereign immunity in actions brought under § 2710(d)(7)(B).¹²⁴ The Fifth Circuit determined that the rules were "not a reasonable interpretation of [the] IGRA" because they violated the Johnson Act, 18 U.S.C. § 1166, and "may authorize Class III gaming without a compact."¹²⁵ Tribes have no recourse but to accept substantial exclusivity if a state demands revenue sharing especially when a state considers it a gift rather than a detriment.¹²⁶

This article will now discuss the evolution of revenue sharing agreements and substantial exclusivity by categorically expanding

¹²² See text accompanying *infra* note 125.

¹²³ 25 C.F.R. § 291.1 (1999) (stating that regulations under this part are invoked when a state and tribe cannot agree to a compact or if a state invokes sovereign immunity in suit brought under 25 U.S.C. § 2710(d)(7)(B)).

¹²⁴ 25 C.F.R. §§ 291.1, 291.8 (1999).

¹²⁵ *Texas v. United States*, 497 F.3d 491, 509 (5th Cir. 2007). The Johnson Act makes it illegal to use or possess any gaming device within Indian Country. In addition, the *Texas* Court inferred that because the Department of Interior can allow a tribe to pursue Class III gaming without a compact, it is a *de facto* breach of deferred congressional power to allow a tribe to pursue gaming without the state's consent. See 24 U.S.C. § 1175(a) (2012). Similarly, 18 U.S.C. § 1166 (2012) delegates to the states both regulatory and criminal authority over gambling in "Indian Country" except for gaming permitted under the IGRA. "Indian Country" is defined as tribal reservation land under the jurisdiction of the United States, any "dependent Indian community" within the United States, and Indian allotments and titles that have not been extinguished by Congress. 18 U.S.C. § 1151 (2012).

¹²⁶ *Tiger Stadium Fan Club, Inc. v. Governor*, 553 N.W.2d 7, 12 (Mich. Ct. App. 1996).

on how the agreements violate tribal economics. This will show how accepted practices underlying revenue sharing for substantial exclusivity agreements do not provide tribes adequate consideration. The United States District Court of Alaska's metaphor that "tribal sovereignty is but a stick in front of a tank" continues to apply.¹²⁷ The difference here is that the definition of "Indian Country" is not the stick, as thought of by the United States District Court of Alaska.¹²⁸ Rather, the tribe's ability to properly negotiate with states is the stick because the United States, as the tank, does not require states to negotiate in good faith. The lack of good faith exists because substantial exclusivity is not adequate consideration within a tribal economy. Because of this, the United States continues to fail to act as a proper brother to the tribes by controlling its children, the states.

A. Meaningful Concessions

The "IGRA [attempts to be] an example of 'cooperative federalism' in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme."¹²⁹ Tribal economics is rejected though because compacts deny tribes the ability to incorporate kinship relations into dealings and forces them to submit to American capitalism.¹³⁰ Each compact represents a breach of trust as each secretarial approval is an implicit application of an assimilation policy that rejects good faith and generous exchanges for the betterment of all persons. A meaningful concession in tribal economics is a detriment that is made for the betterment of everyone. Substantial exclusivity is devoid of that feature.

¹²⁷ *Native Vill. of Venetie I.R.A. Council v. State of Alaska*, 687 F. Supp. 1380, 1392 (D. Alaska 1988) *rev'd*, 918 F.2d 797 (9th Cir. 1990) *opinion withdrawn and superseded on denial of reh'g*, 944 F.2d 548 (9th Cir. 1991) *aff'd in part, rev'd in part*, 944 F.2d 548 (9th Cir. 1991).

¹²⁸ *Id.*

¹²⁹ *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California*, 813 F.3d 1155, 1160 (9th Cir. 2015).

¹³⁰ See FREDERICK E. HOXIE, *A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920* 13-15 (Bison Books ed. 2001).

The state's refusal to consider everyone possibly affected by a compact is demonstrated in the aftermath of the Mashantucket Pequot's 1990 successful challenge to Connecticut's refusal to negotiate.¹³¹ The compact the two parties agreed to contains the first revenue sharing provision. The Tribe provided the State with specified percentages of net revenue from particular pari-mutuel games.¹³² The parties later expanded the revenue sharing agreement to provide that the Tribe would provide the larger of "\$100 million or twenty-five percent" of net revenue derived from slot machines.¹³³ In return, the State provided the Tribe with the exclusive right to install and operate slot machines.¹³⁴ In 1994, exclusivity ended when the State compacted with the Mohegan Tribe, also in Connecticut, for the use of slot machines.¹³⁵

Through the original substantial exclusivity term's breach, it is evident that adequate consideration cannot be found in any such agreement. As other tribes pursue gaming for economic development, good faith is unascertainable because subsequent compacts can inherently breach substantial exclusivity agreements. This puts all kinship relations between a state and relevant tribes at risk as they are not considered at the time of compacting.¹³⁶

Despite the inherent conflict with tribal economics, the Secretary has taken the position that substantial exclusivity agreements are compatible with the jurisprudential standard of good faith.¹³⁷ After *Seminole*, the Secretary defined the standard for good

¹³¹ *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d. Cir. 1990).

¹³² Tribal-State Compact, Mashantucket Pequot Tribe-Conn., § 8(b) (1991). (Compact published for notice and comment Apr. 17, 1991; compact approved and published May 31, 1991, 56 Fed. Reg. 24996). Although the Compact contained a provision that stated that nothing in the compact would be construed to be an extension of Connecticut taxes, the compact required the Mashantucket Pequot to "takeout" a percentage of winning pari-mutual tickets as influenced by Connecticut law. *Id.* §§ 17(f), 8(b). (The Secretary responded to this expansion, and others, of Connecticut tax law by not modifying such provisions as they were a result of the compact bargain).

¹³³ Joseph M. Kelly, *Indian Gaming Law*, 43 DRAKE L. REV. 501, 511 (1995).

¹³⁴ *Id.*

¹³⁵ Tribal-State Compact, Mohegan Tribe-Conn., § 3(a)(i), (1994), (*compact approved and published* 59 Fed. Reg. 65130).

¹³⁶ See *infra* Part V.C.3. California has begun compacting with area tribes to not pursue Class III gaming for economic development while requiring nearby Class III tribes to agree in their compacts that they will provide the nongaming tribe with a percentage of revenue.

¹³⁷ See *supra* note 10.

faith as whether the state “offered meaningful concessions in return for its demands.”¹³⁸ The Secretary maintains that substantial exclusivity is one of few meaningful concessions a state can provide a tribe in return for revenue sharing.¹³⁹ The Secretary defines substantial exclusivity as “prohibiting non-Indian gaming from competing with Indian gaming or by agreeing to relinquish payments if non-Indian gaming is permitted by the state in the future.”¹⁴⁰ The Secretary maintains that a meaningful concession abides by the statutory demand that the State cannot compact to “impose any tax, fee, charge or other assessment on an Indian tribe.”¹⁴¹

Courts reviewing whether the Secretary appropriately found that the state provided a meaningful concession look to the totality of the circumstances as to whether the state’s concessions counterbalance the revenue sharing fee.¹⁴² Analysis is through “[g]eneral principles of federal contract law” rather than the lens of the trust

¹³⁸ *Coyote Valley Band of Pomo Indians v. California*, 331 F.3d 1094, 1111 (9th Cir. 2003) [hereinafter *In re Indian Gaming Cases*]. This definition of good faith enables the court to retain pre-*Seminole* constructions of 25 U.S.C. § 2710(d)(1)(B). For example, the *In re Indian Gaming Cases* Court construed the statute to mean that “a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have.” *Id.* at 1099 (quoting *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1258 (9th Cir. 1994)). Furthermore, the Ninth Circuit appears to be the only circuit to earnestly distinguish meaningful concessions from taxes. *See Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1079-80 (7th Cir. 2015) *cert. denied*, 136 S.Ct. 231 (2015); *Flandreau Santee Sioux Tribe v. Gerlach*, 155 F. Supp. 3d 972, 992 (D.S.D. 2015); *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 932 (7th Cir. 2008) (stating that the Ninth Circuit is the only to address the validity of the agreements). Although not in line with revenue sharing, the Eighth Circuit recently indicated that challenges to the validity of revenue sharing agreements would depend on whether the tribe is the “primary beneficiary” of the compact. *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 785 F.3d 1207, 1211 (8th Cir. 2015). Such speculation is warranted because the Court quoted both statutory language and legislative history stating that Congress’s goal is to promote tribal economic development and prevent tribes from being wholly dependent on the federal government for funding.

¹³⁹ Babbitt, *supra* note 13.

¹⁴⁰ *Id.*

¹⁴¹ 25 U.S.C. § 2710(d)(4); *see also In re Indian Gaming Cases*, 331 F.3d at 1112.

¹⁴² *In re Indian Gaming Cases*, 331 F.3d at 1112.

relationship.¹⁴³ Because § 2710(d)(4) does not categorically prohibit fee demands, if the court determines that the parties agreed to the fee in good faith, the court interprets the fee as not a tax.”¹⁴⁴ Courts that analyze whether a revenue sharing provision is a fee or a tax:

(I) *may* take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) *shall* consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.¹⁴⁵

Through this analysis, the court and the Secretary often determine that revenue sharing is not a tax because tribes make the sovereign business decision to enter into the compact.¹⁴⁶ This forces tribes to reject generosity because rather than assist the state after providing for the tribe, they are forced to provide for the state before tribal members. Tribes have no incentive to further assist the state.¹⁴⁷ Courts refuse to integrate tribal economics into the analysis because cooperative federalism seeks to “incorporat[e] or integrat[e] Indian tribes as sovereign political entities within ‘Our Federalism.’”¹⁴⁸ Because tribal economics contrasts sharply with American capitalism,¹⁴⁹ substantial exclusivity does not promote the building

¹⁴³ *Cachil Dehe Band of Wintum Indians v. California*, 618 F.3d 1066, 1073 (9th Cir. 2010); *see* *Gover & Gede*, *supra* note 10, at 214 (stating that the IGRA has forced tribes to become players in state law and policy).

¹⁴⁴ *In re Indian Gaming Cases*, 331 F.3d at 1112.

¹⁴⁵ *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1027 (9th Cir. 2010) (quoting 25 U.S.C. § 2710(d)(7)(B)(iii)).

¹⁴⁶ *Lent*, *supra* note 120, at 469–470 (2003).

¹⁴⁷ *But see id.* at 470 (stating that tribes use substantial exclusivity not to achieve an asset but to pay for the right to pursue gaming).

¹⁴⁸ Skibine, *Indian Gaming and Cooperative Federalism*, *supra* note 18, at 287.

¹⁴⁹ *See* FRANCIS PAUL PRUCHA, *THE INDIANS IN AMERICAN SOCIETY: FROM THE REVOLUTIONARY WAR TO THE PRESENT* 34 (first paperback ed. 1988); Manley A. Begay, Jr. et al., *Development, Governance, Culture: What are They and What Do They Have to Do with Rebuilding Native Nations?*, in *REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT* 34, 34–41 (Miriam Jorgensen ed., 2007) (discussing the conditions tribes face when pursuing economic development); EagleWoman, *Tribal Nation Economics*, *supra* note 14, at 396–98 (discussing United States trade restraints on tribes and tribal responses).

and maintenance of the kinship relationship between tribes and states. The relationships are rejected because the state determines the percentage of net revenue it receives and defines the exclusivity territory which often is not economically advantageous for the tribe.¹⁵⁰ This demonstrates the lack of good faith, generosity, and fundamental differences between capitalism and tribal economics and why a traditional contract law analysis is insufficient. There simply is no consideration provided by the state to accord with tribal economics.

*B. Creating Dependence on a State is Not a Meaningful
Concession*

Although Congress has not demonstrated a clear intent to abrogate tribal inherent sovereignty,¹⁵¹ substantial exclusivity provisions have changed the sovereignty hierarchy. Every approved compact further erodes tribal sovereignty because states impose requirements in addition to revenue sharing. States can require regulatory authority over the gaming enterprise and reimbursement for costs the state incurs in regulation or enforcement.¹⁵² States have also required tribes to provide “payments in lieu of taxes” to account in advance for localized services including emergency services and policing.¹⁵³ This forces tribes to make the decision of whether the potential economic benefits of Class III gaming are for the best

¹⁵⁰ See Fletcher, *supra* note 11, at 66–68 (discussing the rise of off-reservation gaming).

¹⁵¹ Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2039 (2014).

¹⁵² See generally Tribal-State Compact, Mashpee Wampanoag Tribe-Mass., (2013) (compact approved and published 79 Fed. Reg. 6213); Tribal-State Compact, Seneca Nation of Indians-N.Y. (2002) (compact approved and published 67 Fed. Reg. 72968); Tribal-State Compact, Coeur d’Alene Tribe-Idaho (1992) (compact approved and published 58 Fed. Reg. 8478); Tribal-State Compact, Mashantucket Pequot Tribe-Conn. (1991) (compact published for notice and comment Apr. 17, 1991; compact approved and published 56 Fed. Reg. 24996); Tribal-State Compact, Omaha Tribe of Neb.-Neb. (1990) (compact approved and published 57 Fed. Reg. 7290).

¹⁵³ See Kevin K. Washburn, *Indian Gaming: A Primer on the Development of Indian Gaming, The NIGC and Several Important Unresolved Issues*, A.B.A. Center for Continuing Legal Education National Institute, Criminal Justice Section, Gaming Enforcement, Feb. 7-8 2002. Payments in lieu of taxes are not considered taxes because to be considered a tax against a tribe, a tax must be levied with “the power of sale and forfeiture” should the tribe fail to pay. See *In re Kansas Indians*, 72 U.S. 737, 760 (1866).

interest for the tribe because it has to relinquish control of its internal governance to pursue this form of economic development.

This is not how Justice Marshall in *Cherokee Nation* envisioned the trust relationship between the United States and tribes. The United States is the “great father” charged with protecting tribal inherent sovereignty since tribes “appeal to [the United States] for relief,” not the individual states.¹⁵⁴ *Seminole* has forced tribes to depend on the states to compact in good faith in order to engage in Class III gaming since the IGRA’s enforcement mechanism has been deemed unconstitutional.¹⁵⁵ This changes the sovereignty hierarchy from one where tribes enjoy greater sovereignty than states by being a domestic dependent nation whose pupilage is to the United States,¹⁵⁶ to one where tribes are dependent on the individual state. The IGRA, and subsequent interpretations, have effectively delegated the tribe’s dependence on the United States to the individual states, similar to Public Law 280’s delegation of jurisdiction.

There is no question that Congress intended to provide tribes with the superior bargaining position in compact negotiations through the IGRA’s good faith requirement.¹⁵⁷ Although revenue sharing existed before the *Seminole* decision, tribes did not enter into the agreements out of requirement, but out of generosity. Now states often use revenue sharing as a prerequisite for substantive compact negotiations.¹⁵⁸ This power play within each revenue sharing agreement causes tribes to discard a portion of their inherent sovereign authority in dictating how they choose to use gaming to achieve self-determination through economic development.¹⁵⁹

¹⁵⁴ *Cherokee Nation*, 30 U.S. 1, 2 (1831).

¹⁵⁵ See *supra* section III; see also PRUCHA, *supra* note 149, at 28–54.

¹⁵⁶ See *Cherokee Nation*, 30 U.S. at 2.

¹⁵⁷ See 25 U.S.C. §§ 2710(d)(3)(A), (d)(7)(A)(i), (d)(7)(B)(ii)–(iii) (2012).

¹⁵⁸ Fletcher, *supra* note 11, at 58–60.

¹⁵⁹ For example, the Pueblo of Pojoaque is currently enmeshed in a legal battle with the State of New Mexico in the Tenth Circuit because the State refuses to renegotiate the compact unless the Tribe agrees to increase the revenue sharing agreement from eight percent to ten percent. Pueblo of Pojoaque v. New Mexico (10th Cir. 2015) (No. 15-2187); Anne Minard, *Pojoaque Tribe Says New Mexico is Bullying Them Into Higher Revenue Sharing Rate*, INDIAN COUNTRY TODAY MEDIA NETWORK (July 15, 2015), <http://indiancountrytodaymedianetwork.com/2015/07/15/pojoaque-tribe-says-new-mexico-bullying-them-higher-revenue-sharing-rate-161072>.

States have created a new form of tribal dependency – one based on greed. This is contrary to the dependency, as the federal government views it, because state-caused dependency does not protect and assist tribal economic development as the “great father.”¹⁶⁰ There is no question that Congress’s inability to restore the balance of power between tribes and states after *Seminole* represents a failure to act as the guardian for all tribes, as established by *Cherokee Nation v. Georgia*,¹⁶¹ despite appeasing the states after *Cabazon* by enacting the IGRA.

What can be negotiated for at the bargaining table is not the only limitation on a tribe’s ability to pursue Class III gaming. The state’s constitution can also serve as an effective limitation as to what games the tribe can use for economic development.¹⁶² Indeed as stated by the Tenth Circuit, “[s]tate law must determine whether a state has validly bound itself to a compact.”¹⁶³ Such a declaration is significant because the IGRA defines card games as Class II if they “are not explicitly prohibited by the laws of the State and are played at any location in the State.”¹⁶⁴ Because the state can refuse to compact if its constitution or laws prohibit specific games, tribes are dependent on the state to either amend its law or allow the tribe to engage in games that conflict with state law.¹⁶⁵

With many states outlawing or significantly limiting gambling,¹⁶⁶ States remain in a powerful position to demand

¹⁶⁰ See *Cherokee Nation*, 30 U.S. at 2.

¹⁶¹ *Id.*

¹⁶² See generally *Idaho v. Coeur d’Alene Tribe*, 794 F.3d 1039 (9th Cir. 2015).

¹⁶³ *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997).

¹⁶⁴ 25 U.S.C. § 2703(7)(A)(ii)(II) (2012).

¹⁶⁵ See *infra* Part IV.C.; *Idaho v. Coeur d’Alene Tribe*, 794 F.3d at 1043–44; See generally *In re Indian Gaming Cases*, 331 F.3d 1094. In *Idaho v. Coeur d’Alene Tribe*, the issue surrounded whether Texas Hold’em was to be construed as a Class II or Class III game. By citing IDAHO CONST. art. III, § 20, the Court determined that it was not because “[g]ambling is contrary to public policy and is strictly prohibited” and exceptions for the lottery, pari-mutuel betting, bingo, and raffle charity games may not “employ any form of casino gambling including, but not limited to . . . poker.” 794 F.3d at 1043. Also of significance is that the Court refused to apply the Indian Canons of Construction to benefit the Coeur d’Alene Tribe since IDAHO CODE § 18-3801 provided a “statutory exemption for bona fide contests of skill, speed, strength or endurance” because such a reading would make the statute in conflict with the Idaho Constitution. *Id.* at 1043.

¹⁶⁶ See generally IDAHO CONST. art. III, § 20; N.Y. CONST. art. I, § 9; UTAH CONST. art. VI, § 27; OKLA. STAT. ANN. tit. 21, ch. 38, § 941–961 (West 2015).

revenue sharing agreements with tribes.¹⁶⁷ Capitalization of this superior bargaining position does not equate to adequate consideration in a tribal economy because negotiations are not in good faith. Nor are they entered into out of a generous desire to help their tribal neighbors. Rather, compacts are the culmination of state greed and exploitation. This contravenes any foundation of kinship relationship between the state and the tribe because the compacting process is based on hostility and individualism and not building a cohesive community. States deny tribes the ability to steward its economic resources gained through Class III gaming because the State takes its percentage of net revenue *before* the tribe can account for tribal needs. The state denies the best interest of the tribe in negotiations and tribes try their damndest to prevent the state from exploiting its weakened bargaining position. There simply is a failure to consider the best interest of both the tribe and state by both parties in an attempt to achieve a mutually beneficial arrangement. The hostility involved in compact negotiations makes tribes disinclined to act generously by sharing surplus monies with the state because of the disregard for the kinship-based economy.¹⁶⁸

*C. Judicial Refusal to Accommodate and Amend Bad Faith
Compacts*

Quite recently, the Ninth Circuit determined in *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California* that a tribe cannot retrospectively challenge a revenue sharing agreement or any other fee arrangement in a compact

¹⁶⁷ See 25 U.S.C. § 2710(d)(1)(B) (2012). Class III gaming is lawful if the tribe is “located in a State that permits such gaming for any purpose by any person, organization, or entity.” *Id.*

¹⁶⁸ This is not always true though. In *Dalton v. Pataki*, the New York Court of Appeals held that the IGRA preempted the State’s constitutional ban on commercial gambling and allowed the governor to enter compact negotiations because the state allowed regulated gambling. 855 N.E.2d 1180, 1189 (2005). Furthermore, North Carolina has rejected the argument that 25 U.S.C. § 2710(d)(1)(B)’s mandate requires the state to permit the same gaming opportunities for its citizens that is compacted for with the tribe. *McCracken & Amick, Inc. v. Perdue*, 687 S.E.2d 690, 696 (N.C. Ct. App. 2009). See also CAL. CONST. art. IV, § 19.

“actually reached” between the state and tribe.¹⁶⁹ The only remedy available to a tribe for a bad faith compact approved by the Secretary is rescission of the compact.¹⁷⁰ Through the Pauma Band’s experience, it is evident that tribes do not receive adequate consideration. Good faith transactions within a kinship network require accommodation and a willingness to build off of and repair mistakes, not an arbitrary end to the agreement.¹⁷¹ Where compacts are devoid of these traditional facets of kinship, consideration in a tribal economic framework is absent.

In 2000, the Pauma Band of Luiseno Mission Indians and over sixty other tribes in California signed nearly identical compacts due to fears that the Department of Justice would punish California tribes without compacts.¹⁷² Tribal fear was also due in part to the California Supreme Court’s holding that Proposition 5, a ballot approved statute that allowed compacts and Indian gaming, was unconstitutional because it violated Article IV, Section 19(e) of the California Constitution since it allowed casinos.¹⁷³ California voters responded on March 7, 2000, by ratifying Proposition 1A, a constitutional amendment that exempted tribes from Section 19 and provided a “constitutionally protected monopoly [for tribes] on most types of Class III games.”¹⁷⁴

Because of the quagmire, the Pauma Band in April 2000 signed a compact negotiated in September 1999 because the compacts provided tribes licenses for specific games (such as slot machines) based on a mathematical formula.¹⁷⁵ The *Pauma* court

¹⁶⁹ *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California*, 813 F.3d 1155, 1173 (9th Cir. 2015).

¹⁷⁰ *See id.* at 1173.

¹⁷¹ *See generally* RICHARD WHITE, *THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1615-1815* IX–X (22nd printing, 2009).

¹⁷² *Pauma Band of Luiseno Mission Indians*, 813 F.3d at 1161; *In re Indian Gaming Cases*, 331 F.3d at 1103.

¹⁷³ *Pauma Band of Luiseno Mission Indians*, 813 F.3d at 1160-61; *Hotel Employees & Rest. Employees Int’l Union v. Davis*, 981 P.2d 990, 1005 (Cal. Sup. Ct. 1999).

¹⁷⁴ *Pauma Band of Luiseno Mission Indians v. California*, 813 F.3d at 1161; *In re Indian Gaming Cases*, 331 F.3d at 1103.

¹⁷⁵ *Pauma Band of Luiseno Mission Indians v. California*, 813 F.3d, at 1161; for more information about the mathematics underlying licensing pool agreements, *see* *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty v. California*, 618 F.3d 1066, 1070–71 (9th Cir. 2010).

acknowledged that “[d]ue to the limited time the tribes had to negotiate with [California], the parties agreed to the 1999 Compact without ever discussing their radically different interpretations of how many licenses the statewide license pool formula actually produced.”¹⁷⁶ In December 2003 California declared the license pool exhausted and the Pauma received only 200 of 750 requested slot machine licenses in the following draw.¹⁷⁷ The Pauma successfully renegotiated the compact with California in 2004 for unlimited licenses.¹⁷⁸ The Pauma and five other tribes amended their compacts with California to provide for an additional 22,500 slot machine licenses to be distributed outside the license limits contained in the 1999 Compacts.¹⁷⁹ California only provided the Pauma with about 1,050 licenses each year, despite neighboring tribes each having a minimum of 2000 slot machine licenses and raised the annual fee from \$315,000 to \$7.75 million per year.¹⁸⁰

In 2010, the Ninth Circuit held that the Cachil Dehe Band of Wintun Indians were correct that California erred in the calculation of the amount of licenses available in December 2003.¹⁸¹ Shortly after, the Pauma filed a complaint that attacked the formation of the 2004 Amendment under various theories, including mistake and misrepresentation.¹⁸² On appeal, the Ninth Circuit determined that a misrepresentation of fact occurred because an additional 8,050 licenses existed the license pool in December 2003.¹⁸³

The Pauma also argued that California negotiated in bad faith in all dealings during the prior fifteen years and requested the court to compel re-negotiation of the Amendment.¹⁸⁴ The Court acknowledged that if California had properly represented the number of licenses available, the 2004 amendment “never would have been negotiated in the first place” but declined to compel California to re-enter negotiations since the 2004 Amendment was

¹⁷⁶ *Pauma Band of Luiseno Mission Indians v. California*, 813 F.3d, at 1161.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Cachil Dehe Band*, 618 F.3d at 1072.

¹⁸⁰ *Pauma Band of Luiseno Mission Indians v. California*, 813 F.3d, at 1162.

¹⁸¹ *Cachil Dehe Band*, 618 F.3d at 1084–85.

¹⁸² *Pauma Band of Luiseno Mission Indians v. California*, 813 F.3d 1155 at 1162.

¹⁸³ *Id.* at 1166.

¹⁸⁴ *Id.* at 1171.

judicially rescinded.¹⁸⁵ The Court also interpreted the IGRA to find that it forbids compelling a state to re-negotiate when bad faith negotiations occur because the IGRA's remedies "simply do not apply when the state and the tribe have *actually reached a Compact*."¹⁸⁶

For tribes, this secondary holding is catastrophic because a good faith assessment in a compact will only be determined as to primary negotiations where a state refuses to sign, not the subsequent negotiations or the actual terms of the compact. In other words, once the Secretary approves the compact, the compact is considered to have been negotiated in good faith. If bad faith is found after the state has signed, the court will only rescind the compact.

The *Pauma* holding enshrines the idea that compacts do not require good faith dealing because while mistakes will always be made, rescission as the sole remedy removes the United States' burden of compelling the states to fix mistakes and deal in good faith.¹⁸⁷ This pushes tribes further from engaging in generous acts such as gifting surplus revenue to the state. Tribal ability to provide for its members also suffers because a state can manipulate the tribe to enter into a fraudulent compact and only fear that the compact will be judicially rescinded. The state does not have to worry about punishment from the United States; it only gambles on the tribe's prospective economic contribution through revenue sharing. This is not how a proper kinship network in a tribal economy operates.

V. THE DUBIOUSNESS OF SUBSTANTIAL EXCLUSIVITY

There is no question that "[a] compact is a contract[, that] represents a bargained-for exchange between its signatories."¹⁸⁸ The IGRA's compact process enables states to encumber tribal land subject to the Secretary and National Indian Gaming Commission's (NIGC) approval because the compact requirement restricts tribal

¹⁸⁵ *Id.* at 1173.

¹⁸⁶ *Id.*

¹⁸⁷ See generally RICHARD WHITE, *THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1615-1815* IX-X (22nd printing, 2009).

¹⁸⁸ *Kansas v. Colorado*, 533 U.S. 1, 20 (2001).

use of its land.¹⁸⁹ Both agencies are required by 25 U.S.C. § 81 to prevent the exchange of “dubious services . . . in exchange for enormous fees.”¹⁹⁰

The Secretary is required to approve any “agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years.”¹⁹¹ Only if the Secretary determines that the agreement does not fall within the statute’s scope does it not apply.¹⁹² Absent a specific statute, this standard applies to any service transaction involving Indian land that could lessen the land’s value.¹⁹³ When a state “permits” a tribe to engage in Class III gaming,¹⁹⁴ a service is involved because the state is not required to enter into compact negotiations and consents to the tribe’s engagement in Class III gaming to prevent the land from further depreciation in value.¹⁹⁵

Generally, substantial exclusivity arrangements are approved due to § 2710 (C)(vii)’s grant for negotiations to include anything “directly related to the operation of gaming activities” including “negative externalities.”¹⁹⁶ Regardless of how the parties address the issues,¹⁹⁷ the IGRA’s failure to address the limitations of the

¹⁸⁹ 25 U.S.C. §§ 81(b), (f)(2). Subsection (f)(2) states that “Nothing in this section shall be construed to . . . amend or repeal the authority of the National Indian Gaming Commission under the Indian Gaming Regulatory Act.” Furthermore, 25 U.S.C. § 2711 expressly states for management contracts under the IGRA “[t]he authority of the Secretary under section 81 of this title, relating to management contracts regulated pursuant to this chapter, is hereby transferred to the [National Indian Gaming] Commission.

¹⁹⁰ *Penobscot Indian Nation v. Key Bank of Maine*, 112 F.3d 538, 548 (1st Cir. 1997).

¹⁹¹ 25 U.S.C. § 81(b) (2012).

¹⁹² *Id.* § 81(c).

¹⁹³ *Penobscot Indian Nation*, 112 F.3d at 550–51 (1st Cir. 1997); *Wisconsin Winnebago Bus. Comm. v. Koberstein*, 762 F.2d 613, 619 (7th Cir. 1985); *Encumbrance*, BLACK’S LAW DICTIONARY (10th ed. 2014); *see also* A.K. Management Co. v. San Manuel Band of Mission Indians, 789 F.2d 785, 786 (9th Cir. 1986). The critical word in § 81 is “services” because sales of goods are not included under the statute. *U.S. ex rel. Steele v. Turn Key Gaming, Inc.*, 260 F.3d 971, 975 (8th Cir. 2001).

¹⁹⁴ 25 U.S.C. § 2710(d)(1)(B).

¹⁹⁵ *Id.* at (d)(3)(B); *supra* Part III.; *Permit*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁹⁶ *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1033 (9th Cir. 2010 (citing *In re Indian Gaming Cases*, 331 F.3d 1094, 1111, 1114 (9th Cir. 2003)).

¹⁹⁷ *See id.*

provision should place it within the protections of § 81.¹⁹⁸ Furthermore,

Congress intended that there would be both federal and state review of gaming contracts; however, the two serve entirely separate functions. Federal approval is designed to ensure that the contracts tribes enter into are fair and reasonable. State compacts, however, are designed to protect the state's taxing authority and police powers over gaming and are *not designed to protect tribal interests*.¹⁹⁹

Because of this, § 81 requires both the Secretary and the NIGC to protect tribes from “improvident[,] unconscionable” and illusory compact provisions.²⁰⁰ This duty includes protection from substantial exclusivity arrangements because they often are an illusory service used as consideration for enormous fees under the guise of revenue sharing agreements.²⁰¹

This section will first discuss the economic benefits states often receive in addition to revenue sharing. Second, this section will analyze the illusory nature of substantial exclusivity and how it contrasts with tribal economics. Finally, this section explores how revenue sharing arrangements in New York, Oklahoma, California, and California both conform and contrast to tribal economics. This analysis shows that the state is the primary beneficiary under substantial exclusivity provisions and their inherent bad faith nature makes them inadequate for consideration in tribal economics.

¹⁹⁸ See *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767, 786 (9th Cir. 2008) (holding that the plain language of § 2710(b)(2)(A) does not establish a § 81 duty within a contract between a tribe and a third party).

¹⁹⁹ *Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 547 F.3d 115, 126 (2d Cir. 2008) (emphasis added).

²⁰⁰ *In re Sanborn*, 148 U.S. 222, 227 (1893); *United States v. Colville*, No. 2:97CV330-C, 1998 WL 1818928, 6 (W.D.N.C. June 23, 1998).

²⁰¹ Also of note is that 25 U.S.C. § 2710(b)(3)(B)'s requirement of Secretary approval regardless of the length of the compact supersedes 25 U.S.C. § 81(b)'s requirement that approval is necessary only for contracts entered into for over seven years.

A. Gaming Provides the State with Inherent Economic Benefits

After *Seminole*, states began to demand concessions including profits, treaty rights, endowments, and flat fee payments.²⁰² In 2012, revenue sharing provided the states an estimated \$1.5 billion influx of capital.²⁰³ This staggering number is caused in part due to many tribes not having alternative resources to appease state greed.²⁰⁴ Indeed, states that insist on revenue sharing reject the inherent generosity tribes provide through economic stimulation for rural and some urban markets. This hinders a practicable kinship network within a cooperative federalism framework because revenue sharing preempts any chance of equivocal exchange between the two sovereigns.

At least three reasons demonstrate the positive impacts gaming has on neighboring off-reservation communities, especially in rural areas. First, people who travel to the facility from outside the immediate region to engage with the gaming facility makes it a regional economic asset because of the inevitable tax revenue the state gains from purchases of goods and services by the visitors.²⁰⁵ Second, gaming provides employment opportunities for the local, regional, and reservation locales which provides an economic stimulus in generally impoverished regions.²⁰⁶ Third, gaming revenue is not subject to the global economy because it stays within the tribe's governing jurisdiction allowing the tribe to reinvest revenue for tribal and regional development adding further benefit to the state.²⁰⁷

²⁰² Fletcher, *supra* note 11, at 59.

²⁰³ Randall K. Q. Akee, et al., *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, 29 THE J. OF ECON. PERSP. 185, 201 (2015).

²⁰⁴ See generally *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 at 218–221 (stating that the tribe did not have natural resources and was dependent on bingo enterprise).

²⁰⁵ Akee, et al., *supra* note 203, at 201.

²⁰⁶ *Id.* at 202. One sixteen-year study that encompassed over 100 communities found that communities near an Indian gaming facility experienced a reduction in employment in part due to the increased employment opportunities. *Id.* at 200.

²⁰⁷ *Id.*

Class III gaming provides the state with additional benefits that provide the state with residual economic benefits.²⁰⁸ For example, gaming tribes tend to invest in education, health services, and other social programs to improve the standard of living on the reservations.²⁰⁹ Crime rates decrease which lessens the capital necessary for policing the reservation. This particularly benefits Public Law 280 states that exercise criminal jurisdiction.²¹⁰ Studies have shown that “association with a tribe with Class III gaming leads to higher income, fewer risky behaviors, better physical health, and perhaps increased access to health care.”²¹¹ Some states have acknowledged these inherent benefits. For example, in 2015 the Idaho Department of Labor attributed the Coeur d’Alene Resort in Worley, Idaho as stimulating tourism and population growth that caused an increase in construction, retail sales, health care, services, and government jobs for Kootenai County.²¹²

Despite the socioeconomic benefits gaming provides, states often require revenue sharing agreements that forego the tribe’s ability to steward revenue and further invest for regional development. In a kinship-based economy, tribes would be highly compelled to assist the states in roadway development, crime prevention, and further forms of economic development because both parties benefit and would keep the relationship non-adversarial. This would allow the state and tribe to focus on equivocal exchanges based on the economic stimulation the tribe provides through its gaming facility and the state-provided services. The relationship would foster trust and fair dealing rather than greed, mistrust, and

²⁰⁸ See generally KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, INDIAN GAMING LAW AND POLICY 140–143 (2006).

²⁰⁹ James I. Schaap, *The Growth of the Native American Gaming Industry: What Has the Past Provided, and What Does the Future Hold?*, 34 AM. IND. Q. 365, 375 (2010).

²¹⁰ *Id.*; see also RENÉE ANN CRAMER, CASH, COLOR, AND COLONIALISM: THE POLITICS OF TRIBAL ACKNOWLEDGMENT 100 (2005).

²¹¹ Barbara Wolfe, et al., *The Income and Health Effects of Tribal Casino Gaming on American Indians*, 49 DEMOGRAPHY, 499, 520 (2012).

²¹² Samuel Wolkenhaur, *Workforce Trends, Kootenai County*, IDAHO DEPT. OF LABOR (Dec. 2015), <https://labor.idaho.gov/publications/lmi/pubs/KootenaiProfile.pdf>. The author does not intend to make these correlations absolute because many tribal casinos have failed.

skepticism. Yet, this does not occur as seen by substantial exclusivity's illusory nature.

B. The Illusory Nature of Substantial Exclusivity Terms

Only the Ninth Circuit has attempted to draw the line between when substantial exclusivity provides a substantial economic benefit and when it is an illusory term.²¹³ The court determined that the California Constitution automatically provided tribes exclusivity and thus could not be considered as part of negotiations.²¹⁴ In rejecting a holistic analysis of the compact and looking at the provision in isolation, the court determined the exclusivity agreement illusory because California conceded nothing beyond what the California Constitution provided.²¹⁵ The court did not consider how California could amend its Constitution to remove exclusivity at any time.²¹⁶ This shows that the California Constitution promises tribes nothing because California voters at any time can issue a constitutional amendment eradicating exclusivity. In no way can a voidable compact term that ends revenue sharing at the tribe's expense be deemed a detriment suffered by the state.²¹⁷

Voidable terms are not good faith terms within tribal economics. First, the lack of certainty contravenes the basic notion that a community-based relationship requires understanding that both sovereigns will perform as the terms require. Second, tribes do not gain any benefit other than permission to engage in Class III

²¹³ Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger, 602 F.3d at 1037.

²¹⁴ *Id.* at 1040.

²¹⁵ *Id.* at 1037, 1040. After court mandated arbitration, the Secretary approved the compact that accounted for the event of California abrogating exclusivity in which the tribe would have the right to continue gaming under the compact and payments owed to the State would be renegotiated, thus making the term voidable. Tribal-State Compact, Rincon Band of Luiseno Indians-Cal., §12.4, *compact approved* Feb. 8, 2013.

²¹⁶ For more information regarding California's Constitution, *see supra* Part IV.C.

²¹⁷ *See* Restatement (Second) of Contracts § 85 (1981) (stating that "a promise to perform all or part of an antecedent contract of the promisor, previously voidable by him, but not avoided prior to the making of the promise is binding.")

gaming.²¹⁸ Third, the tribe's sovereign right to determine surplus revenue is revoked because states take their percentage of revenue from net revenues, not surplus funds. Finally, the illusory nature of substantial exclusivity makes such terms devoid of good faith because the state can open non-tribal land to non-Indian competition at any time.²¹⁹ In such circumstances the state will not suffer a true consequence because revenue gained by state regulation would likely off-set the loss of tribal revenue through revenue sharing and tribes would be forced to address increased competition.

The Department of the Interior has determined that substantial exclusivity in return for revenue sharing confers on tribes a "substantial economic benefit."²²⁰ While the state must agree to an economic disadvantage, the state retains the option of performance. Through the terms of the compact, the state has no requirement to maintain exclusivity since there is no duration attached to the term.

The Restatement (Second) of Contracts defines an illusory promise as "[w]ords of promise which by their terms make performance entirely optional with the 'promisor.'"²²¹ For an illustration, the Restatement provides the following example:

A promises B to act as B's agent for three years from a future date on certain terms; B agrees that A may so act, but reserves the power to terminate the agreement at any time. B's agreement is not consideration, since it involves no promise by him.²²²

Substantial exclusivity agreements are analogous to the Restatement's example. First, the tribe promises the state to provide revenue sharing for the duration of the compact for the term of substantial exclusivity. The state agrees to this arrangement but reserves the right to terminate exclusivity at any time and terminate the revenue sharing agreement. Therefore, there is no consideration

²¹⁸ *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F.3d at 1040. (The "IGRA entitles tribes to negotiate for basic Class III gaming rights without being forced to accept revenue sharing.")

²¹⁹ *See* 18 U.S.C. §1151 (2012).

²²⁰ *See, e.g.*, Letter from Kevin K. Washburn, Assistant Secretary – Indian Affairs, to Honorable Russell Begaye, President, Navajo Nation (June 9, 2015).

²²¹ Restatement (Second) of Contracts §77 (1981).

²²² *Id.*

because the state does not promise the tribe to ensure that exclusivity will remain for the duration of the compact. There is nothing resembling good faith in this arrangement; it is merely a mythic creation that the Secretary has deemed a legitimate economic detriment to the state. It does not promote stewardship of economic resources or trade on mutual achievement. The state merely promises the tribe nothing, shrouds the agreement in uncertainty, and forces tribes to pay the state substantial amounts of revenue to pursue gaming for economic development.

The Secretary continues to assert that substantial exclusivity provides a “substantial economic benefit” for tribes despite their illusory nature.²²³ Therefore, the Secretary’s actions are arguably a breach of the duty imposed by 25 U.S.C. § 81.²²⁴ The mere requirement that a compact defines how the term expires essentially serves as a rubber stamp of the agreement and a breach of the Secretary’s duty.²²⁵ Indeed as the Michigan Court of Appeals stated in response to a revenue sharing in exchange for exclusivity arrangement, “[t]he state gave nothing in exchange for the payments.”²²⁶ Despite this understanding, the Secretary continues to allow the practice to continue.

C. Revenue Sharing, Substantial Exclusivity, and Tribal Economics

Revenue sharing agreements provide the state a windfall of capital that is not always used for the betterment of the reservation and the surrounding community. For instance, in 1993, several tribes agreed with Michigan to provide the State with “semiannual payments of eight percent of certain gaming revenue [for] the exclusive right to conduct specified gaming activities in the state.”²²⁷ The United States District Court for the Western District of Michigan issued a consent judgment that approved the agreement

²²³ See Letter from Kevin K. Washburn, Assistant Secretary of Indian Affairs to Honorable Raymond Loretto, Governor of the Pueblo of Jemez (June 9, 2015).

²²⁴ See cases cited *supra* note 200.

²²⁵ See Letter from Kevin K. Washburn, Assistant Secretary of Indian Affairs to Honorable Deval Patrick, Governor of the Commonwealth of Massachusetts (Oct. 12, 2012).

²²⁶ *Tiger Stadium Fan Club, Inc. v. Governor*, 553 N.W.2d 7, 12 (Mich. Ct. App. 1996).

²²⁷ *Id.* at 9.

and the parties agreed to compacts that same day.²²⁸ By 1996, the Michigan Strategic Fund, where the payments were delivered, accumulated \$26,098,551.18 from the tribes.²²⁹ Rather than reinvesting that money within the reservation regions for the betterment of the tribes and surrounding locales to stimulate economic development, the State used the revenue to fund a grant for the construction of Comerica Park in Detroit.²³⁰ In hearing a case about whether the tribal revenues were appropriations, the Michigan Court of Appeals declared the revenue the result of “gratuitous payments negotiated by the Governor.”²³¹ This highlights one of the critical issues with revenue sharing agreements; the states are not limited on their use of the funds. Unlike tribes who are required by the IGRA to use net revenue in defined ways,²³² states are not limited in their use of the funds. Actions such as Michigan’s demonstrate a general refusal to gift the tribal community and surrounding region with the improvements necessary for further economic development. Substantial exclusivity does not provide the tribe with adequate consideration because states can use the revenue in manners that reject the building of a kinship relationship between the state and tribe.

Not all states are the same, and some more than others compact closer to good faith to facilitate the growth and development of a kinship relationship with tribes. It is, therefore, appropriate to discuss a cross-section of compact requirements from New York, Oklahoma, California, and Idaho. Through this, discussion attempts to illustrate how the states either attempt to embrace tribal economics or abjectly refuse it.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.* at 10. Comerica Park is the home of the Detroit Tigers of Major League Baseball and replaced the iconic Tiger Stadium in 2000.

²³¹ *Id.* at 13. The use of Class III gaming revenue by states is not isolated to Michigan. In 2001, Wisconsin allocated \$1.5 million for revenue sharing funds for the construction of the Resch Center in Ashwaubenon, Wisconsin. W.S. Miller & Chad LeBlanc, *Bingo?: An Overview of the Potential Legal Issues Arising from the Use of Indian Gaming Revenues to Fund Professional Sports Facilities*, 19 J. LEGAL ASPECTS SPORT, 121, 130 (2009).

²³² See sources cited *supra* note 15.

1. New York

New York entered into its first tribal-state compact with the Oneida Indian Nation in 1993.²³³ The State did not require the Oneida to provide a revenue sharing agreement and assessed the tribe only for the “reasonable and necessary costs incurred by the State in regulating gaming under this compact.”²³⁴ This requirement comported with tribal economics because not only did the compact define what the costs could consist of;²³⁵ it included in good faith a provision for dispute resolution if the Tribe disagreed with the State’s accounting.²³⁶ New York abandoned this successful method of dealing in 2002 and began requiring revenue sharing agreements with tribes.

In 2002, New York compacted with the Seneca Nation and provided the Tribe with exclusive rights in a 10,500 square mile geographic area in Western New York.²³⁷ In return, the Tribe was required to provide the State with eighteen percent of the “net drop” for the first four years, twenty-two percent for the next three years, and then twenty-five percent for the remaining six years of the compact.²³⁸ This exclusivity agreement could have affected the Tuscarora Indian Nation and the Tonawanda Band of Seneca Indians whose reservations lie within the exclusivity range.²³⁹ To account for the potential infringement on the Tuscarora and Tonawanda, the Seneca Nation and New York negotiated an exception.²⁴⁰ New York would not breach the compact should it compact with the Tuscarora and Tonawanda for games the Seneca Nation enjoys.²⁴¹ New York also agreed to prevent any tribe from

²³³ Tribal-State Compact, Oneida Indian Nation of N.Y.-N.Y., (1993) (compact approved June 4, 1993).

²³⁴ *Id.* at §§ 10(b), app. D(b).

²³⁵ *Id.* at § app. D.

²³⁶ *Id.* at § app. D(f). Such procedures are fairly customary in compacts.

²³⁷ Tribal-State Compact, Seneca Nation of Indians-N.Y., § 12(a) (2002) (compact approved Nov. 12, 2002).

²³⁸ *Id.* at § 12(b)(1). The compact defined net drop as “money dropped into machines, after payout but before expense.” *Id.*

²³⁹ *Id.* at § 12(a)(2).

²⁴⁰ *Id.*

²⁴¹ *Id.* If New York does negotiate with the other tribes, the Seneca Nation does not have to provide the State revenue for the games the tribes compact for. *Id.* at § 12(a)(4).

opening a gaming establishment within twenty-five miles of an operating Seneca Nation casino unless that tribe had trust land within that radius as of August 2, 2002.²⁴² The Seneca Nation estimated that despite the exceptions, the compact would provide the Tribe with a gaming enterprise worth over \$5 billion and provide the State with over \$1 billion.²⁴³

Upon review, the Secretary noted the disregard for kinship relations by pointing to the exception and stated his concern that the Seneca Nation's exclusivity could limit the other tribes' economic opportunities.²⁴⁴ Yet, the Secretary determined that the compact did not violate the trust relationship because: 1) the Tuscarora and Tonawanda could pursue Class III gaming on reservation land; 2) they did not have an inherent right to pursue off-reservation gaming; and, 3) were each traditionally opposed to gaming.²⁴⁵ The Secretary did not condone exclusivity and warned against future compacts "pitting tribes against one another."²⁴⁶

New York also provided the Seneca Nation additional substantial economic benefits by gifting it use of the State's eminent domain power, the ability to build two off-reservation casinos in the Buffalo-Niagara Falls market, and sold the Niagara Falls Convention Center to the Tribe for one dollar.²⁴⁷ The Secretary approved the compact because of these additional benefits.²⁴⁸ While the perks in addition to the exclusivity range can be construed as gifts, the lack of disregard of existing kinship relations for monetary gain is problematic.

Also problematic is that the New York Supreme Court severed the Tribe's eminent domain power from the compact if Buffalo refused to allow for a casino because it violated separation of powers

²⁴² *Id.* If this subsection of the compact is breached by New York, the Seneca Nation can end all revenue sharing payments.

²⁴³ Letter from Gale A. Norton, Sec. of the Interior, to The Honorable Cyrus Schindler, Seneca Nation President (Nov. 12, 2002).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*; *see also* Tribal-State Compact, Seneca Nation of Indians-N.Y., § 11, (2002), (compact approved Nov. 12, 2002).

²⁴⁸ Letter from Gale A. Norton, Secretary of the Interior, to The Honorable Cyrus Schindler, Seneca Nation President (Nov. 12, 2002).

principles under the New York Constitution.²⁴⁹ The State and the Tribe did not renegotiate the compact's substantial exclusivity because the Tribe eventually opened casinos in both Buffalo and Niagara Falls.²⁵⁰ This example of the court modifying compact clauses shows that substantial economic benefits are not necessarily guaranteed and causes uncertainty for the tribe.

Despite the Seneca Nation's economic success, the compact shows New York's willingness to disregard kinship relations with non-gaming tribes in exchange for economic benefits. As Secretary Norton indirectly expressed, the limits substantial exclusivity places on non-gaming tribes strains intertribal kinship relations. New York did attempt to improve kinship relations between the State and Seneca Nation through the convention center, use of eminent domain power, and ability to pursue off-reservation gaming. But to be frank, these notions do not appear to be in good faith. It appears that New York desires to capitalize from Class III gaming because the IGRA preempts the New York Constitution's prohibition on commercial gambling.²⁵¹ Apparently, New York sought to exploit the IGRA's loophole by creating a sense of certainty that it will reap the benefits of Class III gaming by minimizing competition, the exclusivity range, and the two off-reservation casinos in major markets. This shows that greed, rather than generous exchange for the betterment of all, appears to be the primary motivation. The notion of greed being the driving force behind substantial exclusivity is evident because New York is paid its revenue before the Tribe can define surplus revenue.²⁵² The New York model is not

²⁴⁹ *Huron Grp., Inc. v. Pataki*, 785 N.Y.S.2d 827, 854, 856 (N.Y. Sup. Ct. 2004) *aff'd*, 23 A.D.3d 1051 (2005).

²⁵⁰ *Overview: Seneca Gaming Corp., THE SENECA NATION*, <http://www.senecagamingcorporation.com/overview.cfm> (last visited Feb. 15, 2016).

²⁵¹ N.Y. CONST. art. I, § 9; *Dalton v. Pataki*, 835 N.E.2d 1180, 1189 (N.Y. 2005).

²⁵² Tribal-State Compact, Seneca Nation of Indians-N.Y., § 12(b)(1) (2002) (compact approved Nov. 12, 2002). It is worth noting however, that the Seneca Nation's parcel of land in Buffalo has been a source of contention for years despite the Secretary deeming the land sufficient to meet the IGRA's requirements. *See Citizens Against Casino Gambling in Erie Cty. v. Chaudhuri*, 802 F.3d 267 (2d Cir. 2015) *petition for cert. filed*, case no. 15-780, Dec. 16, 2015. In 2010, New York attempted to enter into a very similar compact with the Stockbridge-Munsee Community Band of Mohican Indians. In return for twenty-five percent revenue, the tribe was to receive exclusivity rights to New

representative of adequate consideration in a tribal economy. New York replaces good faith, generosity, and kinship by greed driven implications designed to maximize its own take with minimal regard for other tribes.

2. Oklahoma

By statute, Oklahoma refuses to allow for tribal economics by requiring tribes to accept and acknowledge to the Secretary that the adhesion compact provides substantial exclusivity.²⁵³ Tribes are required to provide Oklahoma:

four percent (4%) of the first Ten Million Dollars (\$10,000,000.00) of adjusted gross revenues received by a tribe in a calendar year from the play of electronic amusement games, electronic bonanza-style bingo games and electronic instant bingo games,

five percent (5%) of the next Ten Million Dollars (\$10,000,000.00) of adjusted gross revenues received by a tribe in a calendar year from the play of electronic amusement games, electronic bonanza-style bingo games and electronic instant bingo games,

six percent (6%) of all subsequent adjusted gross revenues received by a tribe in a calendar year from the play of electronic amusement games, electronic bonanza-style bingo games and electronic instant bingo games, and

York City's five boroughs, Long Island, and the Catskill Mountains in Upstate New York. Tribal-State Compact, Stockbridge-Munsee Community Band of Mohican Indians-N.Y., § 15, (2010), *compact disapproved* Feb. 18, 2011. The Secretary denied the compact because it would limit the trust lands use solely to gaming and did not issue an opinion about the revenue sharing agreement. Letter from Donald Lavendure, Principal Deputy Assistant Secretary – Indian Affairs, to Honorable Kimberly M. Vele, President, Stockbridge-Munsee Community Band of Mohican Indians (Feb. 18, 2011). It is also worth noting that this agreement would have made New York and the Stockbridge-Munsee direct competitors with Connecticut, the Mohegan Indian Tribe, and the Mashantucket Pequot Tribe. *See supra* text accompanying note 3.

²⁵³ OKLA. STAT. ANN. tit. 3A, §§ 280, 281 (West 2015).

ten percent (10%) of the monthly net win of the common pool(s) or pot(s) from which prizes are paid for nonhouse-banked card games. The tribe is entitled to keep an amount equal to state payments from the common pool(s) or pot(s) as part of its cost of operating the games.²⁵⁴

Oklahoma defines substantial exclusivity as the State refusing non-Indian gaming to expand in games or locations as of 2004.²⁵⁵ Tribes are required to continue revenue sharing with the State should exclusivity be breached.²⁵⁶ The entity that operates in contravention to substantial exclusivity is punished and must provide the State “no less than fifty percent of any increase in the entities’ adjusted gross revenues.”²⁵⁷ Tribes within forty-five miles of the entity are entitled to “as liquidated damages . . . [a] pro rata [share] based on the number of covered game machines operated by each Eligible Tribe in the time period when such adjusted gross revenues were generated.”²⁵⁸

Further illustrating Oklahoma’s façade of good faith dealings with tribes is how the State places twelve percent of gaming revenue in the State’s General Revenue Fund and the remaining eighty-eight percent into the Education Reform Revolving Fund.²⁵⁹ Oklahoma denies tribes any say in how the funds will be used. Although the statute rejects tribal input to determine for itself what its surplus funds are and then give a gift to the State, the true lack of consideration is found in the inherent failure to deal in good faith through the adhesion compact.

Oklahoma refuses to provide good faith negotiations because it could subsidize non-tribal gaming expansion since the statutory remedy for breach of exclusivity does not injure the State. This is not proper accommodation in a tribal economy because while the State does not suffer a consequence through the breach the tribe is

²⁵⁴ *Id.* at § 281(11)(A)(2).

²⁵⁵ *Id.* at § 281(11)(E).

²⁵⁶ *Id.* at § 281(11)(E).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at § 280, 281(11)(E). The first \$20,833.33 of all fees received are used “for the treatment of compulsive gambling disorder and educational programs related to such disorder.” *Id.* at § 280.

still required to provide revenue sharing. Only if the State and tribe agree to end revenue sharing if Oklahoma strikes the statutory exclusivity of games will the Secretary approve Oklahoma compacts.²⁶⁰ Nothing addresses Oklahoma's domination over negotiations and refusal to accept consequences if the compact is breached.

Oklahoma compels tribes to abandon the building of a kinship network with the State and neighboring tribes. Any tribe that refuses to accept the model compact's insignificant benefits "could [be placed] at a significant disadvantage vis-à-vis those tribes that will be authorized to offer Class III games."²⁶¹ This is not consideration within a tribal economy. Negotiations are devoid of good faith, generosity is absent, and the tribes realize revenue after the State. Oklahoma's greed continues to dominate as technology expands the range tribal offerings of Class III gaming.²⁶²

3. California

The vast majority of legal authority regarding substantial exclusivity agreements derives from California. While this article previously discussed the history of California's process,²⁶³ the Secretary construes the exclusivity provided by the California Constitution as a substantial economic benefit contingent on the tribe's primary economic market.²⁶⁴ As demonstrated earlier,

²⁶⁰ See Letter from Michael D. Olsen, Principal Deputy Assistant Secretary – Indian Affairs, to Honorable Chad Smith, Principal Chief, Cherokee Nation (Dec. 28, 2004).

²⁶¹ See Letter from Acting Deputy Assistant Secretary – Policy and Economic Development to Honorable LeRoy Howard, Chief, Seneca Cayuga Tribe of Oklahoma (Jan. 6, 2006). The date stamped on the letter is probably incorrect as to the year. It was most likely written in 2005 because the compact at issue became active and published in the Federal Register on March 7, 2015. 70 Fed. Reg. 11027.

²⁶² See Letter from Kevin K. Washburn, Assistant Secretary – Indian Affairs to Honorable Janice Prairie Chief-Boswell, Governor, Cheyenne-Arapaho Tribes (Aug. 1, 2013). In this letter, the Secretary of the Interior denied the Cheyenne-Arapaho's compact with Oklahoma because it would have provided Oklahoma a twenty percent revenue share for the right to operate wireless gaming without providing the Tribe any additional substantial economic benefit as to its governing compact based on the Oklahoma statute.

²⁶³ See *supra* Part IV.C.

²⁶⁴ CAL. CONST. art. IV, § 19; Larry Echo Hawk, Assistant Secretary – Indian Affairs, to Honorable Leona Williams, Chairperson, Pinoleville Pomo Nation

substantial exclusivity is illusory despite being construed as a voidable term.²⁶⁵ California realized this before the *Pauma* court's secondary holding that courts will only rescind a compact rather than compel negotiations.²⁶⁶ For example, in California's compact with the Fort Independence Indian Community of Paiute Indians, the Tribe's only remedies should the State breach the exclusivity requirement by amending the California Constitution are:

(1) Terminate this Compact, in which case the Tribe will lose the right to operate Gaming Devices and other Class III Gaming authorized by this Compact; or

(2) Continue under this Compact.²⁶⁷

The Secretary did not respond to this illusory provision.²⁶⁸ Needless to say, the Fort Independence Paiute has no true remedy should California breach the exclusivity provision.

Similarly, but not nearly as drastic, the Coyote Valley Band of Pomo Indians and California amended their compact in 2012. The amendment provides that should exclusivity cease, the Tribe could either terminate the compact or continue operations. If the Tribe continues operations, it will not provide revenue contributions, it will continue compensating the State for regulatory costs, and have a maximum of 1,100 gaming devices.²⁶⁹ It is evident that regardless

(Feb. 9, 2012). The Secretary was reluctant to approve the revenue sharing agreement because the Tribe sits in a "highly competitive but sparsely populated" market and competitor tribes were subject to a ten percent revenue sharing into the Special Distribution Fund for having 751-900 gaming devices. The Pomo are subjected to a fifteen percent revenue sharing agreement. Despite this discrepancy, the Secretary approved the agreement because the Tribe probably would not have that many devices and did not consider the discrepancy in its determination.

²⁶⁵ See *supra* Part V.B.

²⁶⁶ See *supra* notes 184-186 and accompanying text.

²⁶⁷ Tribal-State Compact, Fort Independence Indian Community of Paiute Indians-California, § 4.6 (2013) (compact approved and published 79 Fed. Reg. 3241).

²⁶⁸ 79 Fed. Reg. 3241-42 (2014).

²⁶⁹ Amended Tribal-State Compact, Coyote Valley Band of Pomo Indians-California, § 15.4 (2012) (compact approved and published 77 Fed. Reg. 76514).

of the purported remedies, California refuses to provide adequate consideration within tribal economics.

First, both examples demonstrate the lack of negotiations because both the Fort Independence Paiute and the Coyote Valley Pomo are required to sacrifice sovereignty to pursue Class III gaming through their highly limited forms of recourse. California's potential breach of exclusivity restrains tribes from expanding its gaming enterprise for the betterment of its community. It is likely that a tribe will continue under the compact's restrictions to enjoy the economic benefits of Class III gaming. Second, there is no sense of community, particularly in the Paiute's compact, because the State will not hesitate to charge a tribe more than competitor tribes for gaming devices.²⁷⁰ Finally, and most significant, California receives its share of gaming revenue before the tribe can determine what revenue is surplus and use their revenue as a gift for either the State or other tribes. A forced gifting is not a true gift in tribal economics.

California's revenue sharing agreements have long been contentious issues in the Ninth Circuit.²⁷¹ To briefly summarize, tribes are generally required to provide a percentage of net gaming revenue to two State funds, the Revenue Sharing Trust Fund (RSTF) and the Special Distribution Fund (SDF).²⁷²

California allocates funds to all non-gaming tribes who do not partake in gaming funds paid into the RSTF by tribes.²⁷³ The typical allocation for non-gaming tribes is \$1.1 million per year and California does exempt gaming tribes who have smaller gaming enterprises.²⁷⁴ Exemptions exist through a graduated contribution

²⁷⁰ See *supra* note 264 and accompanying text.

²⁷¹ See generally *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010); *In re Indian Gaming Cases*, 331 F.3d 1094 (9th Cir. 2003); *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003); *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir. 1994).

²⁷² *In re Indian Gaming Cases*, 331 F.3d at 1105. The SDF is also known as the "Tribal Nation Grant Fund."

²⁷³ *Id.*; Cal. Gov't Code § 12012.75 (West).

²⁷⁴ *In re Indian Gaming Cases*, 331 F.3d at 1105; Tribal-State Compact, Fort Independence Indian Community of Paiute Indians-California, §§ 5.1–5.2 (2013) (compact approved and published 79 Fed. Reg. 3241).

dependent on how many gaming devices the tribe operates and valuation attached on each gaming device.²⁷⁵

The SDF contains a similar graduated cost contingent on the number of gaming devices but requires a percentage of net wins rather than a fixed number.²⁷⁶ Funds paid into the SDF are mandated by statute to follow an order or priority that removes direct tribal input. The order is as follows:

- (1) An appropriation to the Indian Gaming Revenue Sharing Trust Fund in an aggregate amount sufficient to make payments of any shortfalls that may occur in the Indian Gaming Revenue Sharing Trust Fund.
- (2) An appropriation to the Office of Problem and Pathological Gambling within the State Department of Alcohol and Drug Programs for problem gambling prevention programs.
- (3) The amount appropriated in the annual Budget Act for allocation between the Department of Justice and the California Gambling Control Commission for regulatory functions that directly relates to Indian gaming.
- (4) An appropriation for the support of local government agencies impacted by tribal gaming.²⁷⁷

Both funds have been determined consistent with the IGRA because the parties chose those methods to deal with consequences relating to opportunity and compensation “directly related to the operation of gaming activities.”²⁷⁸ However, both funds do not provide adequate consideration in tribal economics considering the

²⁷⁵ *In re Indian Gaming Cases*, 331 F.3d at 1105; *see also* Tribal-State Compact, Pinoleville Pomo Nation-Cal., § 5.2(a)(2011) (compact approved and published 77 Fed. Reg. 5566).

²⁷⁶ *In re Indian Gaming Cases*, 331 F.3d at 1105; Amended Tribal-State Compact, Coyote Valley Band of Pomo Indians-California, § 4.3.1(a)(1) (2012) (compact approved and published 77 Fed. Reg. 76514).

²⁷⁷ Cal. Gov’t Code § 12012.85 (West).

²⁷⁸ *In re Indian Gaming Cases*, 331 F.3d at 1114 (quoting 25 U.S.C. 2710(3)(C)(vii) (internal quotations omitted); *see also* Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger, 602 F.3d 1019, 1033 (9th Cir. 2010).

duress many tribes were under when the compacts that began the process were entered into.²⁷⁹ Tribes have no say in how funds are distributed, especially under the SDF. The RSTF denies gaming tribes the ability to fashion kinship relations with neighboring tribes. The State has assumed the position of a father to all tribes rather than a partner in the community.

Recently, California has taken a domineering position that rejects a proper kinship relationship in its compact with the North Fork Rancheria of Mono Indians of California.²⁸⁰ First, the compact required the North Fork to provide “mitigation” to the Chukchansi Indian Tribe by not installing a hotel until 2018 and provide payment into the RSTF equal to the Chukchansi’s payment into the RSTF.²⁸¹ Second, upon the initiation of actual gaming on January 1, 2016, the North Fork was required to provide a certain percentage of net wins dependent on overall net win into the SDF and payment to the Chukchansi would cease.²⁸² Finally, the North Fork was required to pay into a trust account for the Wiyot Tribe determined by a graduated percentage of net win.²⁸³ The Wiyot compacted to relinquish their right to pursue Class III gaming to ensure retrieval of payments.²⁸⁴

The Secretary did not comment on the North Fork’s compact that contained the California Constitution’s automatic grant of exclusivity.²⁸⁵ In 2014, California voters refused to ratify the North Fork and Wiyot’s compacts through Proposition 48. Since then the State has refused to recognize the compact’s existence or reenter negotiations.²⁸⁶ The referendum vote has also caused the compact to be deemed unenforceable.²⁸⁷ Even though unenforceable, the

²⁷⁹ *See supra* Part IV.C.

²⁸⁰ Tribal-State Compact, North Fork Rancheria of Mono Indians of Cal.-Cal., (2012) (compact approved and published 78 Fed. Reg. 62649).

²⁸¹ *Id.* at §§ 4.5(a)–(b). The Chukchansi was then to be reimbursed for its payment into the RSTF through the SDF.

²⁸² *Id.* at § 4.5(c).

²⁸³ *Id.* at § 5.2(a).

²⁸⁴ *Id.*; Tribal-State Compact, Wiyot Tribe-Cal. (2013) (compact approved and published 78 Fed. Reg. 54908–9).

²⁸⁵ Tribal-State Compact, North Fork Rancheria of Mono Indians of Cal.-Cal., § 4.9 (2012) (compact approved and published 78 Fed. Reg. 62649).

²⁸⁶ North Fork Rancheria of Mono Indians of Cal. v. California, No. 1:15-cv-00419-AWI-SAB, at 5–6 (E.D. Cal. Nov. 13, 2015) (order on cross-motions for judgment on the pleadings).

²⁸⁷ *Id.* at 12.

exclusivity arrangement was illusory because the State could breach the provision and not suffer consequence.²⁸⁸

It appears that California is not interested in helping make a community where tribes are able to interact, trade, and communicate with one another freely. The State seems fixated on dividing tribes to maximize profit for its own gain. Even in the North Fork's case, absent the payments to the Wiyot, the tribe would have been required to pay into the SDF and RSTF.²⁸⁹ Even if the North Fork are compelled to pursue gaming because of greed, the Tribe should have the ability to steward its revenue. The Tribe should be allowed to exercise its inherent sovereignty by declaring funds surplus and then generously contribute to the neighboring tribes and California. California did not compact to provide the North Fork with a gift by compacting; it attempted to limit the Wiyot, Chukchansi, and North Fork's sovereignty by not allowing the Tribes to work together. This is not representative of a community built on accommodation; this is division and greed.

4. Idaho

Idaho appears to be using revenue sharing arrangements with Class III gaming tribes for the development of kinship relations and building of a good faith relationship despite substantial exclusivity being inherent in the Idaho Constitution.²⁹⁰ What appears to be typical revenue sharing agreements are actually provisions that compel the tribe to donate five percent of all net revenue for educational purposes.²⁹¹ Before 2002, only the Coeur d'Alene Tribe was subject to such a provision because the Tribe itself insisted in good faith that the provision be included.²⁹² The Tribe and the State agreed that:

²⁸⁸ See Tribal-State Compact, North Fork Rancheria of Mono Indians of Cal.-Cal., § 4.9 (2012) (compact approved and published 78 Fed. Reg. 62649).

²⁸⁹ *Id.* at §§ 4.5, 5.2.

²⁹⁰ IDAHO CONST. art. III, § 20.

²⁹¹ Tribal-State Compact, Coeur d'Alene Tribe-Idaho., § 20.2 (1992) (compact approved and published 58 Fed. Reg. 8478).

²⁹² Chief Allen, Opinion, *Tribe's Education Funding Above Reproach*, COEUR D'ALENE PRESS (Jan. 11, 2012, 7:00 AM), http://www.cdapress.com/news/local_news/article_eec98240-3bb6-11e1-8d64-

The gaming operation shall contribute five percent (5%) of net revenues from authorized Class III gaming for the financial support of education. This sum is to be divided equally between Tribal and public education in the region on or near the reservation. The Tribe may elect to contribute additional sums for these or other educational purposes. *Disbursements of these funds shall be at the sole discretion of the Tribe.*²⁹³

Idaho allows for a kinship relationship to develop between itself and the Coeur d'Alene Tribe because it allows the Tribe to be generous with its revenue for the benefit of both tribal members and Idahoans. This arrangement allows the Tribe to steward its revenue without State interference thus promoting interdependence that benefits all involved.

Before 2002, the only other similar provision that existed in Idaho was with the Kootenai Tribe.²⁹⁴ What distinguished that arrangement from typical revenue sharing agreements is that the Kootenai had the option of contributing up to 2.5% of revenue “for the financial support of local government programs, hospitals, education or other purposes *as deemed by the [Tribal] Council.*”²⁹⁵ Idaho could not compel the Kootenai to donate any funds for any specific purpose. This further fostered the growth of generous exchange in a kinship-based economy.

Through the passage of Proposition 1 in 2002, Idaho codified the Coeur d'Alene Tribe's provision that the Tribe shall donate five percent of net revenue for local education on and near the reservation as a condition precedent for a compact to be amended to include video gaming.²⁹⁶ Both the Kootenai and Nez Perce Tribes, who were not previously required to donate for educational purposes, agreed to this condition to make video gaming an

0019bb2963f4.html. Chief Allen at the time was, and still is, the Chairman of the Coeur d'Alene Tribe.

²⁹³ Tribal-State Compact, Coeur d'Alene Tribe-Idaho., § 20.2 (1992) (compact approved and published 58 Fed. Reg. 8478).

²⁹⁴ See Tribal-State Compact, Kootenai Tribe of Idaho-Idaho., § 20 (1993) (compact approved and published 58 Fed. Reg. 59926).

²⁹⁵ *Id.* at § 20.2 (emphasis added).

²⁹⁶ IDAHO CODE §§ 67-429B, 67-429C.

approved Class III game.²⁹⁷ It is evident that the Coeur d'Alene's good faith compelled Idaho to expand the games available for Class III gaming. Idaho allows tribes to decide if it wants to provide benefits to their neighbors by agreeing to accommodate the expansion of tribal economies.

Despite the Coeur d'Alene, Kootenai, and Nez Perce Tribes working with Idaho for the benefit of all, the Shoshone-Bannock Tribe appear to have rejected tribal economics. The Shoshone-Bannock are only required to reimburse Idaho for expenses incurred through regulation because the Tribe successfully fought against the imposition of the donative revenue sharing requirement for video gaming.²⁹⁸ The Shoshone-Bannock's compact contains a provision that makes it mandatory that the Tribe can offer the same games as other Idaho tribes.²⁹⁹ Once the Kootenai and Nez Perce Tribes amended their compacts to include video gaming, those games automatically became approved games in the Shoshone-Bannock's compact.³⁰⁰

The Shoshone-Bannock successfully argued before the Ninth Circuit that the donation requirement was a tax within the meaning of its compact.³⁰¹ It appears that the Shoshone-Bannock refuse to act as a good neighbor to neighboring state citizens despite the State fostering the growth of tribal economies by making video gaming a valid Class III game. The Shoshone-Bannock's refusal to engage Idaho in good faith after the passage of Proposition One also undermined kinship relations with the other Idaho tribes because it used their detriment for its own benefit by exploiting a technicality.

In general, Idaho uniquely stands out against the norm of revenue sharing agreements.³⁰² All Idaho has done is set a

²⁹⁷ Tribal-State Compact, Kootenai Tribe of Idaho-Idaho., § 6.8.3 (2002) (compact approved and published 68 Fed. Reg. 1068); Tribal-State Compact, Nez Perce Tribe-Idaho., § 6.4.3 (2002) (compact approved and published 68 Fed. Reg. 1068).

²⁹⁸ *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1102 (9th Cir. 2006); Tribal-State Compact, Shoshone-Bannock Tribes-Idaho., §§ 13–14 (2000) (compact approved and published 65 Fed. Reg. 54541–2).

²⁹⁹ *Id.* at 1102; *see also* Tribal-State Compact, Shoshone-Bannock Tribes-Idaho., § 24(d) (2000) (compact approved and published 65 Fed. Reg. 54541–2).

³⁰⁰ *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d at 1102.

³⁰¹ *Id.* at 1101.

³⁰² Idaho has also agreed to pay the Nez Perce Tribe ten percent of all net revenue taken from Idaho Lottery Sales on the Tribe's Reservation. Tribal-State

percentage of revenue of revenue that the Tribe must donate. The State allows the tribe to decide where their revenue goes and does not arbitrarily spend it at will. The tribe can steward its revenue and donate it to purposes that benefit both the tribe and the neighboring state citizens. Although Idaho requires that compacts do “not obligate the state of Idaho to appropriate state funds” to the tribes,³⁰³ the State does appear to have taken the initiative in acknowledging tribal economics and the inherent benefits gaming provides the State.

The tribal gaming economy is estimated to draw over 500,000 people with sixty percent traveling from another state to Idaho.³⁰⁴ In 2014, tribal gaming provided the tribes and Idaho with 3,361 jobs accounting for over \$81 million in wages and salaries.³⁰⁵ Indeed, gaming has allowed tribes to become large employers in their respective regions and their willingness to employ state citizens demonstrates a desire to maintain and build kinship relations. Even though times of difficulty arise between the tribes and the State,³⁰⁶ their willingness to deal in good faith shines through. However, this willingness is not absolute.

Recently, the Idaho Supreme Court addressed a Senate bill that repealed a law that allowed wagering on “historical” horse races at

Compact, Nez Perce Tribe-Idaho., § 6.1 (2008) (compact approved and published 73 Fed. Reg. 58617).

³⁰³ IDAHO CODE § 67-429A(2)(b) (2014).

³⁰⁴ STEVEN PETERSON, TRIBAL ECONOMIC IMPACTS: THE ECONOMIC IMPACTS OF THE FIVE IDAHO TRIBES ON THE ECONOMY OF IDAHO 3 (summary ed., Julie Kane & Darren Williams eds. 2015).

³⁰⁵ *Id.* at 5.

³⁰⁶ See generally *Idaho v. Coeur d’Alene Tribe*, 794 F.3d 1039, 1044 (9th Cir. 2015) (holding that despite Idaho’s uneven enforcement of prohibition on poker, Texas Hold’em could not be considered a Class II game because it is prohibited by Idaho law); *Coeur d’Alene Tribe v. State*, 842 F. Supp. 1268, 1282 (D. Idaho 1994) *aff’d sub nom* *Coeur d’Alene Tribe v. State of Idaho*, 51 F.3d 876 (9th Cir. 1995). There, the Court determined that because lottery was a Class III game in Idaho, the State could not conduct the game on the Nez Perce’s reservation absent a compact and a tribal gaming ordinance. *Id.* Eventually in 2008, the Nez Perce and Idaho compacted to allow the Idaho lottery to be played on the Tribe’s reservation because “it would be in their collective best interests.” Tribal-State Compact, Nez Perce Tribe-Idaho., § 2.8 (2008). See also *Knox v. State ex rel. Otter*, 223 P.3d, 266, 148 Idaho 324 (Idaho Sup. Ct. 2009) (holding that even if video gaming was illegal under the Idaho Constitution, the United States would probably not criminally prosecute the Tribe because the Ninth Circuit found tribal video gaming as legal under Idaho compacts. (citing *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1102 (9th Cir. 2006))).

race tracks.³⁰⁷ The Coeur d'Alene Tribe introduced the repeal bill into the Idaho Legislature.³⁰⁸ The bill passed through both houses of the Idaho Legislature with “overwhelming numbers,” but the Governor and Secretary of State refused to make the bill active law.³⁰⁹ The Governor also failed to veto the bill in accordance with the Idaho Constitution. The Court ordered that the bill be made formal law because of the Governor’s failure to veto it.³¹⁰ Despite this wrinkle in relations between the tribes and the Governor, who did not act to promote kinship relations, the tribes enjoy certainty in knowing what their revenue is used for. The tribe stewards their revenue for education on and near the reservation as they see fit.

Despite the Idaho Constitution’s ban on most Class III games,³¹¹ any kinship-based economy requires both accommodation and equivocal exchange. It appears that Idaho is far closer than most states with revenue sharing agreements because of the State’s willingness to allow tribes to act generously through and steward their own revenue through donations. This approach benefits the whole community and can further be the rational for the State to again expand the games tribes can pursue for economic development. Idaho employs one of the closest examples of a cooperative federalism framework that incorporates tribal economics.

D. No Consideration Found in Substantial Exclusivity

In the states analyzed, the commonality in substantial exclusivity agreements appears to be that they are driven by greed rather than the building of kinship relationships. With the exception of Idaho, the states do not provide the tribes a voice on how gaming revenue will be used. All states secure a portion of net revenue or

³⁰⁷ *In re Verified Petition for Writ of Mandamus*, No. 43169, 2015 WL 7421342 (Idaho Nov. 20, 2015).

³⁰⁸ Jack McNeel, *Idaho Tribes Say Veto of Horse Racing Machines Bill Illegal*, INDIAN COUNTRY TODAY MEDIA NETWORK (Apr. 8, 2015), <http://indiancountrytodaymedianetwork.com/2015/04/08/idaho-tribes-say-veto-horse-racing-machines-bill-illegal-159931>.

³⁰⁹ *Id.*

³¹⁰ *In re Verified Petition for Writ of Mandamus*, 2015 WL 7421342, at 1, 15.

³¹¹ IDAHO CONST. art. III, § 20.

define how a tribe can use revenue before the tribe can provide for its members.

Tribal economics requires that a tribe exercises its inherent sovereignty to the fullest extent. While each state discussed above does compact with tribes, the state uses its superior bargaining position to limit the scope of the tribe's gaming. Through substantial exclusivity arrangements, the state limits tribal sovereignty.

For example, New York allows the Seneca Nation to engage in off-reservation gaming but will not allow the Tuscarora or Tonawanda Seneca the same ability. The Tuscarora and Tonawanda's sovereignty is impeded upon. Oklahoma's statutory exclusivity is not the result of a tribe negotiating for a good faith compact. Oklahoma provides a mere adhesion contract that denies the tribe the ability to do best for its members. California requires gaming tribes to subsidize non-gaming tribes through the RSTF and the State through the SDF. The only thing tribes in California receive is Constitutional protection that California voters can rescind at any time. If that happens, tribes will be forced to decide between abandoning their gaming enterprise or surrendering to the remaining terms of the compact. California tribes are now dependent on California citizens for gaming being a successful form of economic development. Idaho, in contrast with the other States, does lend more to an acknowledgment of inherent sovereignty. The State allows the tribe to allocate funds as the tribe sees fit. However, substantial exclusivity for Idaho tribes is defined on the Idaho Constitution's ban on casino gaming.³¹² This does limit tribal sovereignty because the tribe cannot operate gaming off the reservation and the tribe is dependent on Idaho voters not rescinding the Constitutional provision, albeit highly unlikely to occur. Sovereignty is ignored because the tribe's ability to continue Class III gaming is contingent on the State's actions in regards to the substantial exclusivity provisions.

In tribal economics, good faith requires fair dealing and equivocal exchange.³¹³ Good faith also requires acknowledgment of the community's needs, not just the individual. New York, Oklahoma, and California each refuse to compact in good faith. New

³¹² *Id.*

³¹³ EagleWoman, *Tribal Nations and Tribal Economics*, *supra* note 14, at 836.

York has caused the Seneca Nation to reject its kin in the Tonawanda Seneca and Tuscarora Tribes. Although each tribe has its own reservation land, the rejection of traditional kinship networks demonstrates how New York's dealings forces the tribe to abandon the other tribes that are part of their community. Oklahoma's model compact goes further by preventing tribes from acknowledging kin within the state by presenting a model compact as an adhesion contract. There is no room for negotiation and the bar on non-tribal gaming does not account for equivocal exchange. California's Constitutional provision for substantial exclusivity does not provide a tribe anything as its illusory nature shows. The revenue tribes are forced to contribute to the RSTF and SDF is not an equivocal exchange. The lack of negotiation and accommodation between these states and tribes is astounding but not surprising. Idaho does attempt to promote good faith as seen through its willingness to expand Class III games for tribes. Idaho also allows tribes to account for their community by allowing the tribes to determine whom it will gift its revenue to through donations. Although not perfect, Idaho is attempting to act in good faith through the cooperative federalism framework the IGRA is supposed to present.

Stewardship of gaming revenue by the tribe is also absent in revenue sharing for substantial exclusivity agreements in compacts found in New York, Oklahoma, and California. New York's forcing of the Seneca Nation to provide substantial percentages of its net drop does not allow the Tribe to determine how its revenue is spent. Rather the State decides. Oklahoma does the same through its model compact as does California through the RSTF and SDF. By refusing the tribe to allocate its revenue as it sees fit, the tribe can become disinclined to gift surplus revenue to the outside community and other tribes. This is the error found in California's SDF. No tribe should be forced to subsidize other tribes unless the tribe itself wants to better the whole community or reinforce traditional kinship networks. Idaho does incentivize tribes to act for the betterment of the whole community by allowing tribes to determine how its revenue will be spent. This allows tribes in Idaho to steward its resources and gift it as donations.

As the illusory nature of substantial exclusivity demonstrates, there simply is no consideration in these arrangements. This is definitely true when analyzed through tribal economics. The Secretary is charged with ensuring the trust relationship between the United States and tribes is protected through 25 U.S.C. § 81. However, the Secretary fails to do this by ratifying each tribal-state compact. Trust is breached because of the *Seminole* decision's declaration that the good faith enforcement process is unconstitutional.³¹⁴ That holding allows states to hold hostage tribes who want to engage in Class III gaming. The only recourse for tribes is to agree to revenue sharing for substantial exclusivity if the state demands it. This demonstrates a lack of good faith because there is no equivocal exchange nor is there fair dealing. The state acts individualistically and greedily despite the tribe being part of the state. This discourages gift giving and donation by tribes to the state or other tribes. This erosion of traditional kinship networks is further harmed by substantial exclusivity. Other tribes can become limited in their ability to pursue Class III gaming if their land is within another tribe's range of exclusivity. This is what the Seneca Nation's compact illustrates. While the Tonawanda and Tuscarora could engage in Class III gaming on their reservations, the tribes are not able to expand off-reservation.

Substantial exclusivity tends to cause fragmentation rather than fostering the creation and expansion of a kinship network that incorporates all tribes and states. Once one tribe receives access to games outside of the scope of the exclusive arrangement, other tribes are quick to require the same benefits at the expense of the other tribes. The Shoshone-Bannock's exploitation of Idaho's good faith attempt to expand Class III gaming exemplifies this. States know their superior bargaining position and although they have multiple socioeconomic reasons to consider the whole community, American capitalism's focus on profits tend to drive negotiations. The Secretary merely rubber stamps compacts with substantial exclusivity agreements with little substantive criticism. As shown, these agreements do not have adequate consideration within a tribal economy. Changes are needed to ensure tribes can pursue economic

³¹⁴ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996).

development with substantial exclusivity providing adequate consideration within a tribal economy.

VI. RECOMMENDATIONS

If the IGRA is to be a stimulus for cooperative federalism,³¹⁵ states need to have limits placed on to them due to their superior bargaining position. Action has to come from Congress, the Department of the Interior, and tribes themselves because states have shown little willingness to negotiate with tribes appropriately. Because the IGRA allows revenue sharing and substantial exclusivity agreements as a policy rationale, states tend to mask greed through preemptive fears that socioeconomic conditions will deteriorate in the area surrounding the reservation.³¹⁶ Limits on state bargaining power need to account for tribal economics so gaming tribes can include tribal forms of trade into negotiations. Through the inclusion of kinship economics, compassion, and a willingness to accommodate one another, states and tribes can overcome the greed that currently underlies the compacts that purport to provide substantial exclusivity.

First, Congress needs to amend the IGRA to limit what states can do with net revenue generated by revenue sharing agreements. Because states tend to see substantial exclusivity agreements as gratuitous gifts,³¹⁷ tribes have an expectation of reciprocal gift exchanges. The IGRA should require states to invest the funds on the reservation land for infrastructure, communication, and technological improvements. Funds should also be used to fund and foster economic investment projects with the tribe and state citizens. Such projects could either be funded through compact provisions such as the Coeur d'Alene Tribe's or state provided grants furnished by funds received through revenue sharing. Not only would this demonstrate a willingness to cooperate with each other as sovereigns, the state would be able to reinvest the funds for what they were designed to do, improve the reservation and surrounding areas. These actions would foster the development of proper kinship

³¹⁵ Skibine, *Indian Gaming and Cooperative Federalism*, *supra* note 18, at 287.

³¹⁶ See 25 U.S.C. § 2702(2) (2012).

³¹⁷ *Tiger Stadium Fan Club, Inc. v. Governor*, 553 N.W.2d 7, 12 (Mich. Ct. App. 1996).

relationships between all relevant parties because accommodation would occur for the betterment of all persons involved. In other words, it would create a community, not divided populations. This would provide the tribes and the state a substantial economic benefit and provide the adequate consideration that is currently not found in substantial exclusivity.

Second, Congress needs to realize that substantial exclusivity arrangements are illusory. Most agreements rest on the false notion that the state suffers by allowing gaming on tribal lands especially when the state does not circumvent any state law by compacting. Substantial exclusivity has provided the states a method to force tribes to bargain away their sovereignty. Before providing for tribal members, the tribe is forced to provide an economic benefit derived from a form of economic development oftentimes barred by state law. Congress should either require tribes to ascertain what a proper per capita payment would be for its members on a yearly basis to assist in providing a suitable quality of life or estimate the amount necessary for governmental investment for the development of the reservation. In other words, Congress should require tribes to begin stewarding revenue in anticipation of realizing the revenue. With these estimates, the tribe can negotiate with the state what a proper gift would be and further steward the funds to build a kinship relationship with the state based on understanding. Accommodation would occur because the revenue projections would allow the state and tribe to negotiate what would be a reasonable contribution by the tribe would be for state projects within and near the reservation. This would stimulate cooperation between the sovereigns and benefit all people affected positively and negatively by the gaming enterprise.

Third, the Department of the Interior should institute regulations that define a "substantial economic benefit." Proper guidance when compacting is inexistent because the Secretary looks to pleas by the tribe and state that a benefit is included in a substantial exclusivity provision, then either makes an ad hoc determination or ignores the compact to implicitly approve it 45 days later. The regulations would need to focus on the building of the community surrounding the tribe and within the reservation. Granted, the Department is hamstrung by the *Seminole* decision, but that does not mean that the

states should be allowed to run rampant. The Secretary is required to ensure that tribes are not subject to contracts where they are forced to pay excessive fees for limited services.³¹⁸ Regulations that actually define “substantial economic benefit” would provide revenue sharing agreements consideration in a tribal economy and benefit all parties.

Finally, tribes need to step up and become proactive at the negotiating table and agree to directly assist the state. Not through revenue sharing agreements, but through surplus funds. Granted, not all tribes can contribute large amounts of money. The display of good faith by the tribe, as exemplified by the Coeur d’Alene Tribe, that a partnership does exist is what tribal economics is about. The gift does not necessarily need to be substantial in relation to revenue after fees and costs have been accounted for, but both sides need to assist each other the best they can for a kinship economy to work. This allows the true nature of tribal economics to be implemented into cooperative federalism because the tribe’s generosity should provide an imprint on the state. The state should then feel more compelled to assist the tribe because at the end of the day, the tribe, albeit sovereign, is part of the state’s community. The tribes need to assist in expenditures in proportion to the inherent economic benefits the state receives from gaming. It is apparent that at least for the near future, revenue sharing agreements will continue. Yet, the display of community through such gifts could compel the state to actually give the tribe a substantial economic benefit in the form of investment grants and opportunities to assist the whole community.

VII. CONCLUSION

Substantial exclusivity agreements do not provide tribes consideration either in traditional contract law or in tribal economics. Substantial exclusivity has become a way to fractionate tribes and the surrounding communities while providing an economic windfall to the state. As the very first substantial exclusivity provision between Connecticut and the Mashantucket Pequot demonstrates, tribes are pitted against one another. In order

³¹⁸ 25 U.S.C. § 81 (2012).

for the Mohegan Tribe to pursue Class III gaming, Connecticut had to rescind the Pequot's exclusivity. The Shoshone-Bannock's action in getting the Ninth Circuit to declare the imposition of a five percent donative requirement to engage in video gaming also represents the systems flaws. Because the Nez Perce and Kootenai Tribes agreed to the provision, the Shoshone-Bannock had no reason to work for the betterment of the State and other Idaho tribes. Although their actions demonstrate a rejection of tribal economics, the compacting requirement has at least in part caused these actions.

With courts refusing to acknowledge the inherent duress tribes endure in seeking to engage in self-determination, states are able to continue bad faith negotiations when a substantial revenue source is prime for the taking. The false premise that gaming makes tribes immediately wealthy does not assist because it makes state citizens pressure the state, that could be dealing with a decreasing budget, to demand revenue sharing. This further erodes tribal economics because the state's position to create the best outcome for state citizens comes at the tribe's expense. Revenue sharing simply has no basis in good faith nor equivocal exchange; it is a money grab. Although some states, such as Idaho, have tried to find a middle ground in allowing the tribe to allocate the funds as they see fit, New York, Oklahoma, and California demonstrate that Idaho is the exception, not the norm.

Revenue sharing hinders a tribe's ability to reinvest its proceeds and diversify its holdings for the betterment of the whole community, not just the tribal members. Because of this, tribes are reluctant and often are unable to be generous with earnings because surplus funds are not being used to appease the states, net revenues are. This harms the tribe's ability to steward and protect its economy because of the lack of community. The *Seminole* decision has forced many tribes to depend on the state for protection and development of its economy. This new form of dependency infringes on the very core of tribal sovereignty because the tribe and the state are unable to build a kinship relationship as the linking of arms between brothers who are equal. Rather, conflict and greed ensnare the compacting process and demonstrates how substantial exclusivity does not provide tribes adequate consideration within a tribal economy. Changes are needed and can only occur if Congress, the

Secretary, states, and tribes step up to the plate to better each respective community that is impacted by a tribal-state compact.